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Reprint with a Foreword by

Hon'ble Shri Justice B. MALIK, M.A., LL.B.

OF THE HON'BLE SOCIETY OF LINCOLN'S INN., BARRISTER-AT-LAW
CHIEF JUSTICE, ALLAHABAD HIGH COURT, (NOW RETD.)

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INCOME TAX CASES.

PRIVY COUNCIL.

(382) ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA.

PRESENT:

Lord Blanesburgh, Lord Merrivale and Lord Russell of Killowen.

(26th May, 1930).

Raja Probhat Chandra Barua .. *Appellant.**

v.

The Commissioner of Income-tax, Bengal .. *Respondent.*

Indian Income-tax Act (XI of 1922), Secs. 2 (1), 4 (3), 6 and 12—Income from lands in Permanent Settled Estates—Assessability to income-tax—Permanent Settlement Regulations, Scope of exemption under.

Income derived from lands in permanent settled estates is chargeable to income-tax under Secs. 6 and 12 of the Income-tax Act, the Permanent Settlement Regulations not confering any exemption from liability to future general taxation of income. In assessing such income to income-tax allowance should be made for the jama assessed and paid upon the lands.

In Sec. 6 of the Act, the words "other sources" describe a true residuary group embracing within it all sources of income, profits and gains provided the Act applies to them and used in relation to the word "property" mean sources other than the source which the word "property" connotes in the Act.

Appeal [Privy Council Appeal No. 90 of 1928] against the judgment of the High Court of Judicature at Calcutta [C. C. Ghose, Buckland, Suhrawardy, Panton and Mukerji, J.J., and Rankin, C. J. and Majumdar, J.] dated the 14th March and 11th May, 1927, reported as 2 I. T. C. 392.

E. B. Raikes, G. D. McNair and *L. C. Graham Dixon,* for the Appellant.

A. M. Dunne and *W. Wallach,* for the Respondent.

JUDGMENT.

LORD RUSSELL OF KILLOWEN:—The appellant is zamindar of the permanently settled estate of Gouripur, and he appeals to His Majesty in Council in the circumstances herein set forth.

* 57 I. A. 228 ; 59 M. L. J. 814 ; 32 L. W. 458 ; A. I. R. (1930) P. C 209.

By an assessment note of the Income-tax Officer of Dhubri dated the 28t August, 1925, the appellant was assessed under the Indian Income-tax Act, 1922, to income-tax in respect of income arising from his said estate. On appeal the assessment was confirmed by order of the Assistant Commissioner dated the 22nd December, 1925.

At the request of the appellant the Commissioner of Income-tax, Assam, acting under section 66 of the said Act, submitted certain questions for the decision of the High Court.

The questions so submitted were three in number, and (as amended in the course of the hearing) they were in the following terms:—"I. Whether the following sources of income are agricultural and therefore exempted from assessment to income-tax under section 4 (3) (viii) of the Act? (Then follow 10 items which it is unnecessary to set out here). "II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the Jama at the Permanent Settlement is assessable for income-tax purposes? "III. Whether, having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates, subject to the exemptions provided by the Legislature, is liable to assessment to income-tax?."

In view of a diversity of judicial opinion already existing in regard to the proper answer returnable to the third question, both questions II and III were, by an order of the 21st May, 1926, referred for decision of the Full Bench, the consideration of question I being in the meantime deferred.

The case was argued before the Full Bench consisting of five Judges of the High Court, with the result that Ghose, Buckland and Panton JJ. took one view and Mukerji and Suhrawardy JJ. took a different and opposite view.

The majority of the Judges held that questions II and III should both be answered in the affirmative. In the opinion of the minority, question III should be answered in the negative, from which answer it would follow that question II would not arise.

By order dated the 14th March, 1927, the reference to the Full Bench was disposed of in accordance with the opinion of the majority of the Court.

The remaining question I was decided by the High Court on the 11th May, 1927. The appellant confined his claim for exemption to three items out of the specified ten items, but the High Court held that none of the three items were exempted as agricultural income, and accordingly question I was answered in the negative.

By an order of the High Court dated the 7th November, 1927, the application of the appellant for leave to appeal to His Majesty in Council against the said judgments or orders of the 21st May, 1926, the 14th March, 1927, and the 11th May, 1927, was granted.

It is in these circumstances that the matter came before this Board.

There can be no doubt as to the importance or difficulty of this case which, in their Lordships' opinion, depends primarily, if not entirely, upon the consideration of question III. It is sufficient to state that the problem of the correct

answer to question III has been now considered before different Courts in Madras, Patna and Calcutta by thirteen Judges. As their Lordships read the various decisions, it would appear that five of the thirteen judges would answer question III in the affirmative and eight would answer it in the negative.

The argument for the appellant on question III was presented to their Lordships in great, but not excessive, detail, and covered a wide ground. It may be summarised thus:—That at the time of the Permanent Settlement in 1793 definite guarantees and assurances were given by the governing authority and were embodied in the Bengal Regulations of 1793 (hereinafter alluded to as the Regulations) to the effect that the income of the zamindar from his estate would not, beyond payment thereout of the jama, be further touched or taxed; that the imposition of a tax on the income of a zamindar derived from his zamindari would be a breach of those guarantees and assurances; that the Indian Income-tax Act, 1922, does not, according to its true construction, purport to impose a tax on the income of a zamindar derived from his zamindari; and that, if such a tax could be said to be imposed under or by virtue of the language used in the Act, nevertheless the language used was not so clear and explicit as to operate as a repeal of the legislative provisions of the Regulations. Such in outline was the appellant's contention.

Incidentally to this argument the Board was invited to consider and indeed, pronounce upon the question, mainly historical, of the position of the governing authority immediately before the Permanent Settlement in regard to ownership of the land or of some proprietary interest therein. The attention of their Lordships was called to the various views expressed in such works and documents as Field's "Regulations of the Bengal Code," Phillips's "Land Tenures of Lower Bengal" and Shore's Minutes. Their Lordships were also referred to certain reported decisions of the Courts.

Their Lordships, however, are of opinion that there is here no occasion for any pronouncement by them upon the question of the exact nature of the rights and interests in relation to the land which existed in the governing authority before 1793, but that this appeal falls to be determined upon a consideration of the language of the Regulations and of the Indian Income-tax Act, 1922.

In view of the argument that the Act does not according to its terms purport to impose a tax on the income of a zamindar derived from his zamindari, their Lordships propose in the first instance to examine the language of the Act, and then, if the Act does according to its terms, actually impose such a tax, to consider if the imposition of the tax is to any, and what extent, inconsistent with the provisions of the Regulations.

The Act of 1922 is a consolidation and amendment Act. Section I refers to its title, sphere of operation and commencement. Section 2 is a definition section. The rest of the Act is divided into ten chapters, of which only Chapters I and III seem relevant to the present purpose.

Chapter I is entitled "Charge of Income-tax," and consists of sections 3 and 4. Section 3 is so framed as to charge income-tax at the rate which may from time to time be enacted. The income-tax is stated to be "in respect of all income, profits and gains of the previous year of every individual." Section 4 (1)

provides that the Act is to apply to all income, profits or gains as described or comprised in section 6 from whatever source derived, accruing or arising or received in British India, or deemed under the provisions of the Act to accrue or arise or to be received in British India. Section 4 (2) affords an instance of profits and gains accruing or arising without British India being deemed to accrue or arise in British India. Section 4 (3) enumerates a list of classes of income to which the Act shall not apply. Income derived from a zamindari is not included in the list, but "agricultural income" is included.

It would appear that the purpose of section 3 is to charge income-tax at the current rate for the time being, and that the purpose of section 4 is (by sub-section 1) to confine the tax to income actually or artificially accruing or arising or received in British India, and (by sub-section 3) to exempt specified classes of income from tax.

Although Chapter I is entitled "Charge of Income-tax," the real charging section would appear to be section 6, which occurs in Chapter III.

Chapter III is entitled "Taxable Income," and is composed of sections 6 to 17 inclusive. Section 6 provides that "save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax, in the manner hereinafter appearing, namely:—(i) Salaries, (ii) Interest on securities, (iii) Property, (iv) Business, (v) Professional earnings, (vi) Other sources." Each of the next following six sections deals severally with each of the six heads of income, profits and gains specified in section 6, and states with greater particularity the items in respect of which the tax shall be payable by the assessee under the particular "head," and gives details of allowances and exemption in regard to the different heads. Section 9 accordingly deals with the head "Property," and a perusal of it makes it clear that the "income, profits and gains" charged under the head "Property," are confined to the annual value of "buildings or lands appurtenant thereto" in other words to the annual value of what may be conveniently called house property. The income of a zamindar derived from his zamindari would not be chargeable under that head. If chargeable in the result it would be under the head "other sources."

Section 12 deals with that head, and requires close attention. Section 12 (1) provides that the tax shall be payable by an assessee under that head "In respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)." These words appear to their Lordships clear and emphatic, and expressly framed so as to make the sixth head mentioned in section 6 describe a true residuary group embracing within it all sources of income, profits and gains provided the Act applies to them, *i.e.*, provided that they accrue or arise or are received in British India or are deemed to accrue or arise or to be received in British India, as provided by section 4 (1), and are not exempted by virtue of section 4 (3).

It was contended on behalf of the appellant that the income derived from a zamindari was never brought into charge at all, because, in section 6, the words "other sources" must mean sources other than those described above and therefore could not include any source which could properly be described as "property."

Incidentally it may be pointed out that this argument, if successful could not be confined to the income derived from a zamindari; it would free from liability to income-tax all income derived from land which did not consist of buildings or lands appurtenant thereto, and it would seem to render unnecessary the specific exemption of agricultural income.

Their Lordships, however, feel unable to accede to the argument. In section 6 the words "other sources" used in relation to the word "property" would naturally mean sources other than the source which the word "property" connotes in this Act. But if there were any doubt on this score, it would disappear in the light of section 12, the meaning and effect of which have been indicated above.

Upon this part of the case therefore their Lordships are of opinion that the Indian Income-tax Act, 1922, by sections 6 and 12 brings into charge for the purposes of income-tax the income derived from a zamindari, and that a zamindar is assessable in respect of income, profits and gains derived from that source.

Before leaving this part of the case their Lordships deem it right, in view of discussions in the course of the arguments before the Board, to make a further statement as to the liability of the appellant to pay income-tax upon the income derived from his zamindari.

The tax is upon "income, profits and gains." It is not a tax on gross receipts. With this fact in view, each section which deals with one of the first five "heads" specified in section 6 contains, where proper, specific provisions for the necessary deductions and allowances to be made for the purpose of arriving at the taxable balance. Section 12, which deals with the general residuary group, is necessarily framed in general terms and authorises the allowance of any "expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains."

Their Lordships were unable to ascertain upon what footing the appellant had been assessed in respect of the income derived from his zamindari, *i.e.*, whether on the gross income or after some allowance had been made in respect of the jama assessed and paid upon the lands. Their Lordships are of opinion that, in assessing the appellant to income-tax in respect of the income derived from his zamindari, his income, profits and gains from that source should be computed after making proper allowance in respect of the jama assessed and paid.

Their Lordships now proceed to consider the question whether the imposition of income-tax in respect of the income derived from the zamindari is to any and what extent inconsistent with the provisions of the Regulations.

In regard to this part of the case their Lordships desire to make this observation. The Bengal Regulations of 1793 are lengthy and numerous. In the course of the arguments before the Board attempts were made to support the respective arguments by a phrase picked from one Regulation or a passage chosen from another, even though the particular Regulation only purported to deal with some matter incidental to the Permanent Settlement. In the opinion of their Lordships this part of the case falls to be determined primarily upon a

consideration of the language of Regulation I of 1793. While bearing in mind the passages in other Regulations to which their attention was drawn, their Lordships feel that the above-mentioned Regulation is the master Regulation for the immediate purpose before the Board, and that its provisions constitute the overriding feature in the present case.

It bears date the 1st May, 1793, but is retrospective and operates as from the 22nd March, 1793. This last-mentioned date was the date of a Proclamation, to certain Articles of which the Regulation gave legislative effect.

In so far as it relates to the case of the appellant, the Regulation may be conveniently summarised.

Articles I and II of the Proclamation (paras. 2 and 3 of the Regulation) contain a notification by the Governor-General in Council to all zamindars in the province of Bengal that he has been empowered by the Court of Directors for the affairs of the East India Company to declare the jama which has been or may be assessed upon their lands under the Regulation for the decennial settlement of the public revenues of Bengal passed on the 18th September, 1789, fixed for ever.

Article III of the Proclamation (para. 4 of the Regulation), contains a declaration to the zamindars with whom a settlement had been concluded under the Regulation of the 18th September, 1789, that at the expiration of the term of the Settlement no alteration will be made in the assessment which they have engaged to pay, but that they and their heirs and successors will be allowed to hold their estates at such assessment for ever.

Article VI of the Proclamation (para. 7 of the Regulation), is of great importance and appears to their Lordships to embody the legislative statements and provisions which are most favourable to the arguments advanced on behalf of the appellant. The first sentence recites as facts well-known in Bengal (1) that the public assessment upon the land has never been fixed; (2) that the rulers have from time to time demanded an increase of assessment from the proprietors of land; (3) that for the purpose of obtaining this increase not only have frequent investigations been made to ascertain the actual produce of the estate, but it has been the practice to deprive the proprietors of the management of their lands. The second sentence of Article VI recites that the Court of Directors considers these usages and measures detrimental to the prosperity of the country, and states that the zamindars with whom a settlement has been or may be, concluded, are to consider the orders fixing the amount of the assessment as irrevocable and not liable to alteration. The third sentence runs as follows:—"The Governor-General in Council trust that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present, or any future Government, for an augmentation of the public assessment, in consequence of the improvement of their respective estates."

It is upon this third sentence of Article VI that the appellant mainly relies for his contention that the imposition of income-tax in respect of the income derived by him from his zamindari would be a breach of and inconsistent with

the provisions of the Regulations. He alleges that the jama was a tax and not a rent or rent-charge, and that by the Regulations a legislative assurance or guarantee was given that no tax beyond the amount of the fixed jama would be imposed upon the income of the permanently settled estate.

To this contention the respondent makes answer:—(1) that what the permanent settlement accomplished was to fix for ever the quantum of the Government's share of the produce of the land; and (2) that upon their true construction the Regulations do not purport to exempt the zamindar from taxation in respect of the income derived from his zamindari.

Their Lordships, after careful consideration of the Regulations, have arrived at the conclusion that the argument of the appellant cannot succeed.

They are unable to find in the Regulations any statement or assurance that a zamindar will never be liable to taxation in respect of the income derived from his zamindari, or (to put the matter from another point of view) that a zamindar will, as to so much of his property as consists of income derived from his zamindari, be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India.

The language used in Regulation I, Article VI, does not, in their Lordships' opinion, mean anything other than this:—"You have in the past been liable to have the amount of the jama increased according as the actual produce of the estate increased; to enable the Government to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of your estates. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your zamindari you shall enjoy the fruits of your improvements without fear of the Government claiming that because the revenue produced by the estate has increased the payment you make to Government as a condition of holding that estate shall be increased also."

Their Lordships have ventured to paraphrase Article VI but they think that their paraphrase expresses with sufficient accuracy the true intent and meaning of the Article. In their Lordships' opinion, while the Regulations contain assurances against any claim to an increase of the jama, based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of a zamindari shall not be subjected with other income to any future general taxation of incomes. Their Lordships agree with the views expressed by Ghose, J. in the following passage from his judgment:—"There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are zamindars with whom the Permanent Settlement was concluded or not."

It follows that in their Lordships' opinion Question II and Question III should both be answered in the affirmative.

Question I was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or

reasons which would justify them in suggesting that any of the 10 specified items could properly be described as agricultural income within the definition of agricultural income contained in section 2 (1) of the Indian Income-tax Act, 1922. Their Lordships accordingly agree with the negative answer which has been given to Question I.

For the reasons given their Lordships are of opinion that this appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly. There will be no order as to the costs of this appeal.

Solicitors for the Appellant: *W. W. Box & Co.*

Solicitors for the Respondent: *Solicitor, India Office.*

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(383) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Addison and Mr. Justice Bhide.

(29th May, 1930).

Hotz Trust of Simla .. *Assessees.**

v.

The Commissioner of Income-tax, Punjab and N. W. Frontier Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), *Secs.* 3 *and* 40—*Testamentary trust deed—Trustees carrying on business—Profits distributable among beneficiaries—Assessability of trustees as association of individuals—Beneficiaries, if alone assessable.*

Where under a testamentary trust deed the trustees were given full powers to carry on the Hotel business of the testator, extend it, accumulate income, borrow capital and to distribute the profits and accumulated income among the beneficiaries who had no power to hypothecate their interests or sell the same to any outsider,

HELD, (1) *that the trustees were an association of individuals within the meaning of Sec.* 3 *of the Income-tax Act carrying on the business, assessable as such an unit in respect of the profits of the business in their hands,*

(2) *that Sec.* 40 *of the Income-tax Act is merely a machinery section for collection of tax in special cases and has no bearing on the assessability of a beneficiary in a case where the trustees are liable to be assessed under the general provisions of the Act in respect of the profits of a business carried on by them.*

Case [Civil Reference No. 8 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces, for the opinion of the High Court.

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* I.L.R. 11 Lah. 724; A.I.R. (1930) Lah. 929.

COMMISSIONER OF INCOME-TAX, PUNJAB.

CASE

By an application under section 66 (2) of the Indian Income-tax Act (XI of 1922), I have been asked to refer to the High Court certain questions of law arising out of the assessment to income-tax and super-tax for the year 1928-29 of the Hotz Trust of Simla.

2. *Facts of the case.* The estate now administered by the Hotz Trust formerly belonged to Mrs. Florence Hotz, and consisted principally of a business comprising the keeping of several well-known hotels in Northern India, namely the Gables Hotel and Wild Flower Hall near Simla, the Cecil Hotel in Delhi, and the Cecil and Laurie's Hotels in Agra. The whole income of this business used to be taxed in the hands of Mrs. Florence Hotz, as the income of an individual. For the assessment of 1926-27 it was represented to the Income-tax Officer that the business was now carried on by a partnership consisting of Mrs. Florence Hotz, her daughter Miss Florence Hotz, and her two sons Herman and Robert Hotz. A partnership deed specifying the share of each of these partners was lodged with the Income-tax Officer with a request for registration under section 2 (14) of the Income-tax Act. The Income-tax Officer accepted the application and the assessment was made as on a registered firm. Mrs. Florence Hotz died in October, 1927, and it appears that until the time of her death she had remained the sole owner of the capital of the business and the properties. The deed which she had drawn up to govern the disposition of her estate after her death is the so-called 'Principal Trust Deed' (Appendix I) dated the 17th March, 1924, to which in March, 1927 was added a 'Supplementary Trust Deed' (Appendix II) relating to certain house property. These deeds are testamentary documents and were annexed to the letters of administration granted by this Hon'ble Court on 5th April, 1929. The former deed created a trust "for the continuance and maintenance of the business and properties". The trustees named are Robert Hotz and Florence Hotz children of the testatrix, and Arthur Henry Pook of Simla. The beneficiaries are the eight children of the testatrix, including the two just named, and the share of each is specified. I may remark here that none of these beneficiaries is a minor, lunatic or idiot, and that all of them ordinarily reside in British India. The trustees are directed to keep proper accounts of the business and to issue a yearly balance sheet to the beneficiaries. They are to divide the profits of the business yearly among the beneficiaries in proportion to their respective shares after deduction of certain expenses. They are to set aside a sum of Rs. 20,000 yearly, before distributing profits, as a reserve fund against contingencies, and are to divide this fund proportionately amongst the beneficiaries after ten years, and thereafter periodically as they may decide. They are empowered to appoint and dismiss managers to the hotels, but Miss Florence Hotz is to be the "General Manageress" of the business. By clause 14 they are empowered to open new hotels or rebuilt existing ones, and for this purpose they may at any time borrow money on such conditions as they may think fit on the security of the properties and reserve fund, and may repay such loans "by yearly instalments of principal and interest to the extent of half the profits yearly till the amount borrowed is settled, the remaining half profits to be distributed as heretofore." On the other hand by clause 18 no beneficiary has the power to mortgage or hypothecate his or her interest or part thereof to any one for the purpose of a loan. Again by clause 19 no beneficiary can sell his share to any outsider but must offer the same equally to all the beneficiaries who must purchase it in the manner provided for repayment of loans.

3. It is thus clear that by this disposition the business was left to be carried on by the trustees, who are also empowered to dispose of part of the profits in certain ways before distributing the remainder to the beneficiaries.

Finding this state of affairs to exist, the Income-tax Officer, Simla decided for the year 1928-29 to assess the profits of the business in the hands of the trustees, whom he treated as an association of individuals within the meaning of section 3 of the Income-tax Act. The income thus assessed amounted to Rs. 2,21,551, on which he charged Rs. 20,770 as income-tax and Rs. 17,366 as super-tax. Against this assessment the trustees appealed to the Assistant Commissioner on the ground that the trustees were not liable to be assessed, and the assessment on them as an association of individuals was illegal. The Assistant Commissioner did not accept these contentions, and in his appellate order (Appendix III), dated the 26th July, 1929, confirmed the assessment.

4. I may observe here that the income from the house property mentioned in the Supplementary Trust Deed was not assessed in the hands of the trustees, but the share of each beneficiary has been taxed in his own hands.

5. The trustees have now made an application (Appendix IV) under section 66 (2) in which they ask that the following questions should be referred to the Hon'ble High Court for decision.

6. *Questions to be referred.* (1) "Whether under the provisions of the Income-tax Act of 1922 and the amendments thereto, the three trustees are to be grouped as a unit for purposes of taxation and assessment made on them as such."

(2) "Whether the trustees in this case can be held to be 'an association of individuals' within the meaning of section 3 of the Act."

(3) "Whether under the provisions of section 40 of the Act, the beneficiaries only are liable to the tax."

(4) "Whether the service of notice under section 22 (2) of the Act on Robert Hotz without the compliance of the provisions of section 63 (2) is valid."

(5) "Whether the assessment on the trustees for the whole income is not illegal."

(6) "That the assumptions of the Income-tax Officer and the Assistant Commissioner of Income-tax are not sound in law."

7. *Opinion of the Commissioner.* (1) In my opinion the first question should be answered in the affirmative. Section 40 of the Act, which deals with the liability of a trustee in special cases, admittedly does not apply to the facts of this case. It is therefore necessary to see whether the general provisions of the Act apply. By section 3 tax is to be charged "in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals." The three trustees in this case are associated for the purposes of carrying on the business and distributing the profits, and since they are not a Hindu undivided family, or a company, or a firm it appears to me that they form one of the other association of individuals which the Act contemplates. This view is confirmed by a reference to Chapter III, which lays down the manner in which various types of income, profits and gains shall be chargeable. Section 10 (1) of that Chapter says that "the tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him." In the present case the

business is carried on jointly by the three trustees, and the assessment of the tax payable on the profits must therefore be made on them. It is also important to note that the only place where the whole of the profits and gains of this business can be found is in the hands of the trustees, since, as mentioned above they are empowered to dispose of as much as half of those profits on various objects of expenditure before proceeding to distribute any part to the beneficiaries. There appears to be no relevant difference in this respect between the law of the United Kingdom and that of British India, and the remarks of Viscount Cave and of Lord Phillimore in *Williams* v. *Singer and others* and *Pool* v. *Royal Exchange Assurance* (1) which have been quoted by the Assistant Commissioner in his order seem to me to bear directly on the present question.

These considerations also explain why the income from property was treated differently from the income from business and was assessed in the hands of the beneficiaries. Under section 9 of the Act the owner of property is taxed on its *bona fide* annual value: this latter is a notional income which is not necessarily the same as the actual receipts, and is therefore uneffected by the manner in which the property is administered and in which the actual receipts, if any, are disposed of. There is thus no difficulty in taxing the beneficiary on a share of this notional income corresponding to his interest in the property, as the beneficiaries are merely co-owners of this property. The position in respect of the business is however fundamentally different, for here the tax has to be charged on the actual profits of a business carried on by the assessees. The present business is carried on by the trustees, and the aggregate income which finds its way into the hands of the beneficiaries is not the same as the profits of the business as determined under section 10 of the Act. It would, therefore, be impossible to tax those profits by assessments made on the beneficiaries.

(2) The answer to this question follows the answer to the first question and should in my opinion be in the affirmative.

(3) Section 40 of the Act appears to me to have no bearing on the present case.

(4) Section 63 (2) of the Act merely provides that a notice may be addressed to the principal officer of an association of individuals. This does not, in my opinion, invalidate the service of a notice on one of the three individuals constituting the association, when none of them can be strictly described as the principal officer.

(5) The income assessed in the hands of the trustees was the whole income of the business carried on by them and this was, in my opinion, legal.

(6) This statement is vague and raises no specific point of law.

W. W. K. Page, for the Assessees.

J. N. Aggarwal, for the Crown.

JUDGMENT.

ADDISON, J.:—This is a reference by the Income-tax Commissioner under section 66 (2) of the Act. It concerns the assessment to income-tax for the year 1928-29 of the Hotz Trust of Simla.

(1) 7 Tax Cas. 387 at p 410.

The numerous hotels now run by this Trust belonged to Mrs. Florence Hotz. The income is considerable. It used to be taxed in the hands of the lady named as the income of an individual. For the assessment of the year 1926-27 it was represented to the Income-tax Officer that the business was carried on by a partnership, consisting of herself, her daughter Miss Florence Hotz, and two of her sons, Herman and Robert Hotz. A partnership deed, specifying the shares of each partner, was lodged with the Income-tax Officer with a request for registration under section 2 (14) of the Income-tax Act. This was done and assessment was made for that year as on a registered firm. Mrs. Florence Hotz, however, died, in October, 1927, and it then appeared that, in spite of the alleged partnership deed, she had in fact remained the sole owner of the business. The deed which she had drawn up to govern the disposition of this lucrative and extensive business after her death is the Trust Deed, dated the 17th March, 1924. This deed is a testamentary document and was one of the documents annexed to the letters of administration granted by this Court. The other document annexed need not be referred to, as it was admitted that its existence did not affect the questions raised in this reference. The deed created a trust for the continuance and maintenance of the Hotel business and properties and for their advancement and otherwise for the benefit of her children and grand-children.

The trustees named are Robert and Florence Hotz, two of her children, and Arthur Henry Pook. The beneficiaries are all her eight children, whose shares are specified. All are persons of full capacity, resident ordinarily in British India. The trustees have to keep proper accounts of the business and to have them audited. They have to set aside Rs. 20,000 yearly before distributing profits, as a reserve fund against contingencies, this fund to be divided after ten years amongst the beneficiaries, and thereafter periodically as decided upon, depending upon whether it had or had not been required for capital expenditure. The trustees are empowered to open new hotels or rebuild existing ones and can borrow money, as they think fit, on the security of the properties and of the reserve fund, if the reserve fund itself is not sufficiently large to cover the amount required. The sum borrowed is to be repaid by yearly instalments to the extent of half the profits. The trustees are empowered to dismiss Managers of the hotels, but the general manageress is to be Miss Florence Hotz. No beneficiary has the power to hypothecate his or her interest or part thereof to any one for the purpose of a loan, while no beneficiary can sell his or her share to any outsider but must offer it equally to all the other beneficiaries, who must purchase it in the manner provided for in the case of a loan and its repayment. Lastly, certain periodical payments have to be made by the trustees to various persons named in the trust deed. It follows that the Hotel business was left to be carried on by the trustees and not by the beneficiaries and this was not disputed before us.

The profits of this business were assessed to income-tax in the hands of the trustees, as an association of individuals carrying on a business, for the year 1927-28, and that assessment was not disputed. The assessment for 1928-29 was made in the same way by the Income-tax Officer and an appeal to the Assistant Commissioner was dismissed. The income assessed amounted to Rs. 2,21,551 on which Rs. 20,770 were charged as income-tax and Rs. 17,366 as super-tax. The questions which the trustees, who were not satisfied with the decision of the Assistant Commissioner, requested the Commissioner of Income-tax to refer for the decision of this Court were:

(1) Whether under the provisions of the Income-tax Act of 1922 and the amendments thereto, the three trustees are to be grouped as a unit for purposes of taxation and assessment made on them as such?

(2) Whether the trustees in this case can be held to be "an association of individuals" within the meaning of section 3 of the Act?

(3) Whether under the provisions of section 40 of the Act, the beneficiaries only are liable to the tax?

There were also three other questions. The Commissioner referred all the questions, but no argument was addressed to us on the fourth, fifth and sixth, which were given up. We are, therefore, concerned only with the three questions set out above.

Strictly speaking, there are only two questions to be answered and they are interdependent. This was conceded before us. Questions (1) and (2) go together and raise the question whether the trustees are "an association of individuals" carrying on a business and therefore come within the charging sections 3 and 55 read with section 10, etc., of the Act; while question (3) raises the question whether by necessary implication under the scheme of the Act, in which section 40 finds a place, only beneficiaries, and never trustees, are liable to be taxed. Admittedly section 40 of the Act, which deals with the liability of a trustee in certain specified special cases, does not apply to the facts of this case; and the Income-tax authorities then went on to find whether the trustees were liable in this case under the general provisions of the Act, and held that they were. The question of law for decision in short is whether they were right in so holding.

We have been taken through the Indian and English Acts and in my judgment, there is no essential difference between the law here and in England. It follows that the general principles underlying English decisions can be applied in India. Under section 2 (2) of the Indian Income-tax Act, 1922, as amended by Act XI of 1924 and other Acts, assessee means a person by whom income-tax is payable. Under section 2 (12) the Principal Officer of an association is defined and any person connected with it can be made by notice the principal officer thereof. The charging section is section 3. It runs:—"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to, the provisions of this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals." There is a similar charging section, viz., section 55, for super-tax. In the yearly Indian Finance Acts, the rates to be charged on associations of individuals and others for income-tax and super-tax are set forth. The first question to be answered is whether the trustees in the case before us come within the term "association of individuals" given in section 3, and are thus charged with the payment of income-tax and super-tax, in respect of the income, profits and gains, of the extensive Hotel business carried on by them. Section 4 of the Act deals with the application of the Act and section 6 with the heads of taxable income. Then comes a special section 10, dealing with "business". Section 10 (1) runs:—"The tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him."

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It follows from the above provisions that the trustees under the Hotz Trust would be liable for income-tax and super-tax in respect of the profits or gains of the Hotel business, which they undoubtedly carry on, if they are an "association of individuals" within the meaning of the charging section 3, unless it must be held that, by reason of section 40, the beneficiaries only are liable to pay the tax. The two questions argued are, therefore, closely connected.

An attempt was made to distinguish between the English and the Indian Acts, more particularly in respect of a particular rule appearing in the English Acts, and it was claimed that although by virtue of this rule a body of trustees in England, who carried on a business, might be taxed (though the *dicta* to this effect in various judgments, it was argued, were wrong), this did not warrant the acceptance of this proposition in India, in spite of the Acts being in all material respects the same, as the rule found no place in the Indian Acts. The rule in question in the English Income-tax Act 1918 is rule (1) of the Miscellaneous Rules applicable to Schedule D and runs:—(1) "Tax under this schedule shall be charged on and paid by the person or bodies of persons receiving or entitled to the income in respect of which tax under this schelule is hereinbefore directed to be charged."

In the English Income-tax Act 1842, the same principle was laid down in section 100, where it was enacted that "the duties.....shall be charged annually on, and paid by, the persons, bodies politic or corporate, fraternities, fellowships, companies or societies, whether corporate or not corporate, receiving, or entitled to the profits, etc."

But in my opinion there is no essential difference between these rules and the terms of section 10, read with section 3, of the Indian Act, which in reality lay down that the tax is payable by an association of individuals in respect of the profits or gains of a business carried on by it. The provisions in respect of this in the two Acts do not, therefore, differ in substance.

As the two questions are interdependent, it is necessary to set out section 40 of the Indian Act, under the implied provisions of which it is claimed that trustees can never be taxed but only the beneficiaries, no matter what the provisions of the charging sections are. It runs as follows:—"In the case of any guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India (all of which persons are hereinafter in this section included in the term beneficiary) being in receipt on behalf of such beneficiary of any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary, if of full age, sound mind, or resident in British India, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly." It is not necessary to reproduce sections 41 to 43. The corresponding sections of the English Act of 1842 are 41 to 44.

Again under section 38 (2) of the Indian Act of 1922, the Income-tax Officer or Assistant Commissioner may, for the purpose of the Act, require any person whom he has reason to believe to be a trustee, guardian or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent and of their addresses, while section 37 gives power to call for all documents, etc. The corresponding section in the English Act of 1842 is 51.

The argument based on sections 37, 38 and 40 of the Indian Act is that their enactment by necessary implication shows that in no cases other than those specially provided for was it meant to tax the trustees, and that in all other cases the beneficiaries themselves must be taxed. After careful consideration I can see no difficulty in holding that a body of trustees comes within the meaning of "other association of individuals," as used in section 3 and elsewhere in the Act. No difficulty apparently has arisen on this score in England where the corresponding phrase used is "body of persons." Even if "other association of individuals"

must be *ejusdem generis* with the preceding words, those words are "individual, Hindu undivided family, company, firm." Now firm is a shorthand name for the partners constituting it. It is true that they contract together to be partners, while the trustees are constituted apparently without their consent, though as a matter of fact they would usually be consulted. In my opinion that does not bring trustees outside the term "other association of individuals." Hindu undivided family also occurs in the list and that is an involuntary association brought about by the mere birth of individuals. From the trust deed itself it is apparent that the trustees are a business association with full powers to carry on the business, extend it, accumulate income and borrow capital which can be repaid by instalments up to half the annual income. It appears to me that by this trust deed a very effective business association has been created, and certainly quite as effective as a firm or private company, if not more so. It is clear that the association referred to need not be a legal entity capable of suing or being sued in its own name, just as the same proposition is clear in the case of the English Acts. I am not concerned with certain remarks, made for the guidance of subordinates, in the Income-tax Manual and do not propose to refer to them. But there is one further argument against a body of trustees being held to be an association of individuals which requires further consideration. That is the argument founded on section 40 of the Indian Act to the effect that its enactment implies that beneficiaries are to be taxed except in the special cases dealt with in that section for the taxing of trustees in the place of beneficiaries.

It is true that the interpretation of the Indian Income-tax Act is far from being an easy matter. It is founded on the English Acts with certain differences to meet different conditions. The English Acts have been added to or varied to meet certain attempts to evade them and the same is true of the Indian Acts. The result is that there may appear to be certain inconsistencies, though the intention is in my opinion not very difficult to ascertain. On the English authorities it is clear that section 40 of the Indian Act is merely a machinery and not a charging section. That this is so, was not disputed before us. Bearing that in mind, the intention of the Legislature appears to me to be free from reasonable doubt.

An interesting case touching on this question is *Williams* v. *Singer and others* (1). At the top of page 400 Sankey, J. remarked that section 41 of the English Act of 1842 was a machinery section. It is the same section, though differently worded, as section 40 of the Indian Act. On appeal the Master of the Rolls (at the bottom of page 402 and top of page 403) said that this is merely machinery for the purpose of collecting the duty. On further appeal Viscount Cave made certain pertinent remarks. He said (see page 411, line 18) :—"On the other hand, I do not think it would be correct to say that, wherever property is held in trust, the person liable to be taxed is the beneficiary and not the trustee. Section 41 of the Income-tax Act 1842 renders the trustee, guardian, or other person who has control of the property of an infant, etc., chargeable to income-tax in the place of such infant, etc. and the same section declares that any person not resident in Great Britain shall be chargeable in the name of his trustee or agent having the receipt of any profits or gains. Section 108 of the same Act which deals with the profits or gains arising from foreign possessions or foreign securities, provides that, in default of the owner being charged, the trustee, agent, or receiver thereof shall be charged for the same. And, even apart from these special provisions, I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance, a trustee carrying on a trade for the benefit of creditors or beneficiaries, a trustee for charitable purposes, or a trustee who is under an

(1) 7 Tax Cas. 387.

obligation to apply the trust income in satisfaction of charges or to accumulate it for future distribution appears to come within this category."

Viscount Cave might have had the trust deed in question before him when he made these remarks; for it not only provides for the carrying on of a business for the benefit of beneficiaries but the trustees have to pay part of the income in satisfaction of certain charges, such as pensions, etc., and also accumulate it for future distribution, not to speak of their power to borrow capital and repay it by instalments up to half the yearly income. Viscount Cave continued:—"The fact is that, if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income, which it is sought to reach."

That remark, in my opinion, applies with full vigour to the Indian Act. Section 40 is merely a machinery section, making the trustee liable for beneficiaries in certain cases where the beneficiaries are difficult or impossible to get at, and where the trustee acts as a conduit-pipe for the conveyance of the income to the beneficiaries. It does not affect the charging sections 3 and 10 of the Indian Act under which the trustees as an association of individuals, carrying on a business, are liable to be assessed in respect of the gains of the business carried on by them. In fact it is clear that this is the only way that the profits and gains of the business, carried on by the trustees, can be taxed. For it is obvious that, if what goes to each beneficiary every year only can be taxed, much of the income acquired by the business will altogether escape taxation, and that the income received by the beneficiaries is not the true assessable income as many of the expenses incurred by the trustees, which would be paid out before the distribution takes place, would not be admissible under the Act. The profits and gains of this business carried on by the trustees, can only be calculated in the hands of the trustees as such and the assessment in the hands of the beneficiaries would be in reality inconsistent with the intention of the Income-tax Act. The trustees both carry on the business and are in receipt of the profits and it is they who must be taxed under the charging sections.

One quotation may be made from the judgment of Lord Phillimore in the same case (see bottom of page 417 *ibid*) :—"It may perhaps be said that where there is a trust for accumulation or for payment of debts, no person can be said to be entitled to the profits and that in such case the trustee is to be the person to be assessed. It is possible also that, where trustees have the management of a business, they should be the persons to be assessed or charged. There are disbursements which may have to be made in the course of conducting a business, which a prudent owner would consider as deductions from profits and which trustees would make before they paid the net income over to the beneficiary but which nevertheless for income-tax purposes, as the law at present stands, are not considered as legitimate deductions from income. In these cases, if the revenue is to receive its full quota, it would seem that the assessment must be put upon the trustee and not upon the beneficiary and that in such cases the trustee is the person to be assessed." It is impossible for me to add to the weighty words of these noble Lords whose remarks, quoted above, might have been made in respect of the case now before us.

Tischler v. *Apthorpe* (1) is also in point. It was held that though there was a power of assessing an agent of a foreign firm under section 41 of the English Act, 1842, that did not relieve the principal from his liability to assessment when he could be served with the proper notices. The decision turned on

(1) 2 Tax Cas. 89.

the argument that section 41 (which is equivalent to section 40 of the Indian Act) was intended only to aid the Commissioners in recovering the tax and not to alter the incidence of taxation in any way. This decision was followed in *Werle and Co.* v. *Colquhoun*(1). It is obvious that the trustees under the Hotz Trust carry on a business, are an association of persons for that purpose, and are therefore liable to be taxed on the profits or gains of the business. The above decisions show that there is no real inconsistency in the enacting of section 40 of the Indian Act, and that this was done to provide for certain special cases, without its affecting in any way the liability to be taxed under the charging sections.

Fry v. *Shiels Trustees*(2) a decision of the first Division of the Court of Session (Scotland) also throws light on the subject. A business was carried on by testamentary trustees, on behalf of two minor beneficiaries and the whole of the net profits was annually handed over to or on behalf of the beneficiaries. It was held that the business was the property of the trustees and that the profits were not earned by the beneficiaries and were not immediately derived by them from the carrying on of their trade. This authority has only an indirect bearing on the questions raised before us, but, so far as it goes, it is in favour of the Income-tax Commissioner. It has to be pointed out that in the above case there was no provision for accumulation of income, etc.

Some argument was addressed to us on the circumstance that section 14 of the Act was not amended when Act XI of 1924 added the words "other association of individuals" to the charging and other sections. This was, in my opinion merely accidental and, as a matter fact, section 14 was amended by Act XXII of 1930. I do not attach any importance to this part of the argument, as there is admittedly no intention of imposing a double income-tax.

Certain arguments for and against the two views are briefly summarised at pages 793 to 795 of Sundaram's Law of Income-tax in British India, 2nd edition, where he takes the view that there is no difference between the English and Indian Income-tax law in this respect and that the trustees are the proper persons to be taxed in a case like the present, it being a question which must depend upon the nature of the trust and the facts of each case, whether the trustee or the beneficiary should be taxed.

I would, therefore, answer the first question set forth in the beginning of this judgment in the affirmative and, as the answer to the second question follows the answer to the first question, I would answer it also in the affirmative. My reply to the third question is that section 40 is merely a machinery section for the collection of tax in special cases and has no bearing on the present case as the trustees are liable under the general provisions of the Act to be assessed in respect of the profits or gains of the Hotel business carried on by them under the style of the Hotz Trust of Simla.

As this question does not appear to have been before the Courts in India, I would make no order as to costs.

BHIDE, J.:—I agree.

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(1) 2 Tax Cas. 402.
(2) 6 Tax Cas. 583.

(384) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice and Mr. Justice Ba U.

(11th June, 1930).

E. M. Chettyar Firm .. *Assessees.**

v.

The Commissioner of Income-tax, Burma ..

Indian Income-tax Act (XI of 1922), Secs. 66 (3) and 66-A—Letters Patent (Rangoon) Cl. 37—High Court refusing to require Commissioner to state a case—Appeal to Privy Council, if lies.

No appeal lies to His Majesty in Council under Clause 37 of the Letters Patent (Rangoon) from an order of the High Court under Sec. 66 (3) of the Income-tax Act refusing to require the Commissioner of Income-tax to state a case, an order under Sec. 66 not being appealable except as provided in Sec. 66-A of the Act.

Application [Civil Miscellaneous Application No. 60 of 1930] for leave to appeal to His Majesty in Council against the judgment of Carr and Cunliff, JJ., dated the 19th March, 1930 and reported as 4 I.T.C. 464.

Foucar, for the Assessees.

A. Eggar, Government Advocate, for the Crown.

JUDGMENT.

PAGE, C. J.:—This petition raises a question of some difficulty and importance, namely, whether an appeal lies to His Majesty in Council under clause 37 of the Letters Patent of 1922 from an order of the High Court refusing to require the Commissioner of Income-tax of Burma to state a case under section 66 (3) of the Income-tax Act (XI of 1922)

The material facts preceding the order in question are set out in *E. M. Chettyar Firm* v. *Commissioner of Income-tax* (1), and need not be restated. It will be observed that on a reference being made to the High Court under section 66 (2) it was held that:—"if the enhancement of the Assistant Commissioner is based on materials from which he could reasonably conclude, though only as a rough estimate, that two lakhs of rupees was the income of the Moulmein business then the enhancement was legal; if, on the other hand, the enhancement was wholly arbitrary and based upon no materials, it was illegal. In view of this answer the proper course for the Commissioner to adopt will be to call upon the Assistant Commissioner to give the grounds on which he based his assessment, and the Commissioner as an appellate tribunal can then consider whether the enhancement was justified on these materials. If in his opinion there were materials on which the Assistant Commissioner could arrive at the enhanced figure there is an end of the matter, since there is no further appeal, and we cannot enter into questions of fact, namely, as to the sufficiency of those materials for the conclusion arrived at." (*ibid* p. 122).

* I. L. R. 8 Rang. 435; A. I. R (1930) Rang. 274.
(1) 4 I. T. C. 111.

Revenue Authority of Bombay(1). But the order in question was not—and I think could not have been—made under the Specific Relief Act, for the assessees had another 'specific and adequate legal remedy' which they were entitled to pursue, namely, an application to the High Court for an order requiring the Commissioner to state and refer a case under section 66 (3) of the Income-tax Act, 1922. Section 48 of the Specific Relief Act, provides for an appeal from an order made under section 45 of that Act, but no appeal is provided under section 66 of the Income-tax Act from an order of the High Court made under that section. Under section 66-A (2), however, "an appeal is granted to His Majesty in Council from a judgement of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for an appeal to His Majesty in Council."

In my opinion, the object and effect of sections 66 and 66-A of the Income-tax Act, 1922 was to provide special machinery whereby the Commissioner or the assessee should be enabled to obtain the opinion of the High Court upon any question of law arising in the course of the assessment. The jurisdiction with which the High Court is invested under the Income-tax Act, 1922, however is of an exceptional nature, and I apprehend that the intention of the Legislature in enacting sections 66 and 66-A was to provide that the only procedure available for obtaining a reference by way of case stated should be that prescribed under these sections. In my opinion the effect of sections 66 and 66-A is that no appeal lies from an order of the High Court under section 66 (3) except as provided in section 66-A. In 1922 the Legislature re-modelled section 51 of the Income-tax Act of 1918, and in 1926, after the decision of the Privy Council in *Tata Iron and Steel Co., Ltd.* v. *Chief Revenue Authority of Bombay* (2) and *Alcock Ashdown and Co., Ltd.* v. *Chief Revenue Authority of Bombay* (1) by section 8 of Act XXIV of 1926 it was provided that under section 66-A (2) a limited appeal should be permitted to the Privy Council from a judgment of the High Court "on a reference made under section 66 where the High Court certified that the case was a fit one for appeal to His Majesty in Council." No provision, however, was made in section 66-A for an appeal to His Majesty in Council from an order of the High Court under section 66 (3) refusing to require the Commissioner to state a case, and I am of opinion that the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from such an order.

Further it appears to me that there were sound reasons for granting an appeal from a judgment of the High Court where the High Court had entertained a reference, and providing no appeal where the High Court refused to order the Commissioner to state and refer a case. Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact, and where neither the Commissioner nor the High Court are opinion that any question of law has arisen in the course of the assessment it well may be that the Legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review an assessment which in the opinion of the High Court turned solely upon questions of fact (see per Lord Macnaughten in the *Rangoon Botatoung case*(3), and for that reason granted an appeal only where a case had been stated and a reference entertained by the High Court. In either case, of course, the right to apply to His Majesy in Council for special leave to appeal would not be affected.

If the law were otherwise, the position would be an anomalous one. Under section 66-A (2) an appeal lies to His Majesty in Council from a judgment

(1) 1 I.T.C. 221. (2) 1 I.T.C. 206.
(3) I.L.R. 40 Cal. 21 at p. 28.

—I concur.BA U., J.:—I concur.BA U., J.:—I concur.BA U., J.:

(16th June, 1980). (16th June, 1980). (16th June, 1980). (16th June

J. J. J.

Commissioner of Income-tax, Burma, to state a case for the opinion of the High Court.

Leach, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

This is an application by the assessee, under section 66 (3) of the Income-tax Act, 1922, to the High Court for an order requiring the Commissioner to state a case and to refer it to the High Court. Under section 66 (3), the High Court can only require the Commissioner to state a case "if it is not satisfied of the correctness of the Commissioner's decision."

Now, the Commissioner has refused to state a case on an application by the assessee under section 66 (2) upon the ground that no question of law arose out of the order of the Assistant Commissioner passed on the 20th of February, 1929, under section 31 of the Act. The question of law which it is suggested has arisen is set out in the order of the Commissioner as follows:—"Should the Income-tax Officer have assessed the petitioner in respect of its house properties on the basis of the valuation figures for the year ending the 31st March, 1929, or on the figures for the accounting period?".

The property in respect of which the assessment under section 9 (1) of the Act is disputed is immovable property. This property is house property, and under sub-section (1) the tax is assessed in respect of the *bona fide* annual value of such property. Under section 9 (2) "annual value shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year."

Now, material evidence of the annual value of property in any year is the rent which is in fact payable during that year; but the rent payable is not conclusive; and the question as to what is the annual value of any particular property in any particular year is a question to be determined according to all the circumstances of the case. The houses in question were let for the most part for a long term at low rents, and those rents were fixed at some period prior to the repeal of the Rangoon Rent Act in 1926. The Assistant Commissioner came to the conclusion that the actual rents payable during the accounting period in some cases were known, and that in other cases they were not.

It was the duty of the Income-tax Officer, and on appeal of the Assistant Commissioner, to ascertain as best as he could upon the materials before him what was the annual value of the premises in question for the accounting period ending in December, 1927. He took into account the actual rentals paid, but for the reasons that I have stated he did not regard the rents actually payable as reliable evidence of the annual value. In 1928 there had been an assessment of these premises for municipal purposes, and it appears from the order of the Commissioner that the municipal valuations of 1928 were based on the conditions existing in 1927, that is, during the accounting period, and the Assistant Commissioner in the course of his order stated that although the municipal assessment was in 1928 "the municipal assessments take heed of the events of past periods," which is clearly only another way of saying that in arriving at the valuation for the assessment in 1928 the conditions prevailing in 1927 were taken into account. In these circumstances the Assistant Commissioner in respect of these premises based his assessment of income-tax on the assessment made for municipal purposes in 1928.

On the application of the assessee that the Commissioner should state a case and refer it to the High Court, upon the question whether the Income-tax Officer and the Assistant Commissioner were not bound to estimate the assessment for the accounting period ending in December, 1927 upon the figures of that period, and not on the basis of the valuation figures for the year ending 31st March, 1929, the Commissioner observed that "the 1923 valuations were made when the Rent Act was in force, whereas in 1927 that Act was not in force. In many cases the actual rents received in 1927 were in excess of the 1923 valuations, and it is clear that the 1928 valuations, based as they were on conditions existing in 1927, were suitable for adoption in this assessment, whereas the 1923 valuations had no relation to the facts as they were in 1927."

The complaint of the assessee is not that the municipal valuations were in no case and in no event evidence of the annual value of the property, but that the valuation for the purpose of the year ending 31st March, 1929, was not evidence of the annual value of these premises in the year ending December, 1927. The reasons given by the Commissioner and the Assistant Commissioner, in our opinion, disposed of this question; for it appears from the orders passed by the Assistant Commissioner and the Commissioner that the municipal assessments, which were taken as the basis of the assessment of income-tax for the period ending in December, 1927, were in fact based upon conditions prevailing in 1927. For these reasons the Assistant Commissioner and the Commissioner came to the conclusion that the municipal assessments which were taken as the basis of the annual value for the year ending in 1927 might reasonably be taken as evidence of the annual value of the premises for that year.

We are not satisfied that the conclusion at which the Commissioner arrived in refusing to state a case was incorrect; on the contrary we think that the conclusion at which he arrived was a sound conclusion in all the circumstances of the case. The question as to what is the annual value of any premises for the accounting period is a question of fact, and we think that no question of law arose out of the order of the Assistant Commissioner or in the order of the Commissioner. The application of the assessee to the High Court for an order requiring the Commissioner to state a case must be rejected. The petition is dismissed with costs.

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(386) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

(25th October, 1929).

Nathu Mal .. *Assessee.**

v.

The Commissioner of Income-tax, Punjab and N. W. Frontier Provinces.

Indian Income-tax Act (XI of 1922) Secs. 66 and 66 (A)—Decision raising no question of general importance—Appeal to Privy Council—If certifiable as a fit case.

* A.I.R. (1930) Lah. 109.

Where the decision of the High Court on a reference under Sec. 66 of the Income-tax Act was of no general importance and laid down no principle of general application, the High Court will not certify the case to be a fit one for appeal to the Privy Council under Sec. 66 (A) of the Act.

Application [Miscellaneous Petition No. 235 of 1929] under Sec. 66 (A) of the Indian Income-tax Act (XI of 1922) for leave to appeal to the Privy Council against the judgment of the High Court dated 7th January, 1929 reported as 3 I.T.C. 341.

Dev Raj Sawhny, for the Assessee.

Aggarwal, for the Crown.

JUDGMENT.

On a reference made by the learned Commissioner of Income-tax under section 66 (3) Income-tax Act, this Bench affirmed his opinion that though a disruption had taken place of the joint family consisting of the assessee Nathu Mal and his sons, Nathu Mal succeeded to and carried on the old business. Being dissatisfied with this finding the assessee has applied for leave to appeal to His Majesty in Council, and his application is under section 66 (A) Income-tax Act. In *Delhi Cloth and General Mills Co.* v. *The Commissioner of Income-tax, Delhi* (1), a Division Bench of this High Court pointed out that clause (2) section 66 (A), was in terms the same as section 109 (c) Civil Procedure Code and held that an appeal to His Majesty in Council could be allowed only in cases in which the High Court could certify that the question of law involved was one of great public or private importance. The assessees in that case then applied for special leave to appeal against the decision of the High Court, but their Lordships of the Judicial Committee dismissed their petition holding that the right of appeal is given by section 66 (A) (2) only in a case which the High Court certifies to be a fit one for such an appeal and that the High Court is justified in refusing a certificate in a case which in its view does not raise any question of such importance as would warrant a certificate under section 109 (c) Civil Procedure Code.

In the present case the applicant has failed to show that there is any question of the importance contemplated by section 109 (c). Our decision that the assessee Nathu Mal succeeded to the old business is of no general importance and lays down no principle of general application. We, therefore, see no reason for granting the certificate applied for and dismiss this application with costs.

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(387) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Jai Lal and Mr. Justice Agha Haidar.

The Laxmi Insurance Co., Ltd., Lahore .. *Assessees.*

v.

The Commissioner of Income-tax, Punjab and N. W. Frontier Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 34 and 59 and Rule 25 of Income-tax Rules—Life Assurance Company starting business in 1924—First Actuarial report in 1928 and first assessment in 1928-29—Assessment for years prior thereto—Income, if assessable under Sec. 34 as escaping assessment—Rule 25, if mandatory.

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(1) 2 I.T.C. 439.

The assessees, an Insurance Company which started business on the 1st May, 1924, were first assessed for 1928-29 on the net profits of the previous year, being a fourth share of the profits disclosed in the actuarial report prepared for the period of 4 years ending the 30th April, 1928 as provided by Rule 25 of the Income-tax Rules. For the year 1927-28, the Income-tax Officer purporting to act under Sec. 34 of the Act made a similar assessment on a further fourth share as income escaping assessment.

HELD, that there being no machinery provided by law during the year 1927-28 for ascertaining or assessing the income of the Company in accordance with the provisions of Rule 25, no income escaped assessment within the meaning of Sec. 34 of the Act and hence the assessment for 1927-28 was illegal.

Rule 25 of the Income-tax Rules is mandatory and provides the only manner for determining the income, profits and gains of a Life Assurance Company.

Case [Civil Reference No. 7 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and North-West Frontier Provinces for the opinion of the High Court.

CASE.

By an application under section 66 (2) of the Indian Income-tax Act (XI of 1922) I have been requested to refer for the decision of the Hon'ble Judges of the High Court a question of law arising out of the assessment to income-tax for the year 1927-28 of the Laxmi Insurance Co., Ltd., of Lahore.

2. *Facts of the case.* The assessee, which is a Life Assurance Company incorporated in British India, started business in May, 1924. The first actuarial valuation was made at the end of four years, for the period ending 30th April, 1928, and revealed a surplus on this period's business of Rs. 1,25,684. After certain deductions inadmissible for income-tax purposes had been 'added back,' the average annual net profits were determined to be Rs. 34,707. The 'previous year' for assessment purposes was by an order under section 2 (11) (b) of the Income-tax Act determined by the Commissioner, who has been authorized by the Central Board of Revenue in this behalf, to be the twelve months (corresponding with the Company's accounting period) ending on the 30th April, of the financial year for which the assessment is to be made. The Income-tax Officer, Lahore, made an assessment for the year 1928-29 on the income of the twelve months ending on 30th April, 1928. This assessment was made in accordance with Rule 25 of the Indian Income-tax Rules, and no appeal has been lodged against it by the assessee. The Income-tax Officer, however, finding that no tax had ever been levied on the Company for any of the previous years during which it had carried on its business, also took steps under section 34 of the Act and in his order dated 31—5—29 made another similar assessment for the year 1927-28. This assessment was also based on the actuarial valuation, and in this way tax was charged on a further one-fourth share of the surplus which had been made on the first four years' business. The Company objected to this supplementary assessment and lodged an appeal before the Assistant Commissioner, who in his order dated 25—9—1929 disallowed the objection and upheld the assessment. Against this decision the Company has now made an application under section 66 (2), requesting that the question of law formulated below be referred to the High Court for decision.

3. *Question to be referred.* The question which I am asked to refer is, "whether in the circumstances of this case the assessment made under section 34 for the year 1927-28 is legal."

4. *Opinion of the Commissioner.* In my opinion this question should be answered in the affirmative. Section 58 (2) (a) of the Act confers on the Central Board of Revenue the power to make rules prescribing the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of insurance companies. In the exercise of this power the Central Board of Revenue has made rule 25 of the Income-tax Rules. This rule prescribes that in the case of Life Assurance Companies incorporated in British India, whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the Life Assurance business shall be the average annual net profits disclosed by the last preceding valuation, subject to certain additions. But for the existence of this rule it would be an exceedingly difficult, indeed an impossible task, for an Income-tax Officer, who has no actuarial qualifications, to assess the profits of an Insurance Company; and any attempt on his part to do so would probably cause great inconvenience to the assessee. It is in order to avoid these difficulties and this inconvenience that the rule has empowered the Income-tax Officer to take as the basis of the assessment for any year the profits, scientifically ascertained at the last actuarial valuation of a year which is not necessarily or usually the normal 'previous year.' But the situation out of which this reference arises is the simple one in which an assessment has been made on the profits, actuarially ascertained, of the very period of which the income which had not previously been taxed, was to be assessed.

Section 34 of the Act provides that if for any reason income, profits or gains chargeable to tax has escaped assessment in any year, the Income-tax Officer may, within one year of the end of that year, initiate proceedings for assessment of the escaped income. In the present case the income, profits or gains chargeable to tax in the year 1927-28 had escaped assessment because the Income-tax Officer was at that time unable to compute them. But when before the end of the following year there came ino his hands a scientific computation of what those profits had been, he was in my opinion entitled under the law to take the necessary steps to assess the income which had escaped tax. The special provisions of Rule 25 could not in my opinion have the effect of preventing him from applying to the situation the section of the Act which has been specifically enacted to enable the department to repair, within a certain time-limit, an ascertained loss to the Revenue such as had occurred in this case. The assessee can hardly complain that this action was inequitable, seeing that even now half the ascertained profits of the first four years' working have escaped taxation. Whenever the Company may cease its business, the last assessment will be made on the last period of one year or less for which it worked, and the Revenue can receive no compensation for the loss of the tax on the profits of the first two years' working.

Badri Das and *Har Gopal,* for the Assessees.

Aggarwal, for the Crown.

JUDGMENT.

JAI LAL, J.:—This reference under section 66 of the Indian Income-tax Act has been made by the Commissioner of Income-tax under the following circumstances.

The Lakshmi Insurance Company started business on the 1st of May, 1924 and as provided by section 8 of the Life Assurance Companies Act, 1912, the first actuarial report as to its financial condition and the valuation of its liabilities was prepared for the period ending the 30th of April, 1928, that is to say, for the first four years of its actual working, as a result of this valuation a profit of Rs. 1,25,684 was found to have been made by the Company. In this manner the average net profits for one year have been found to be Rs. 34,707. The Company was for the first time assessed to income-tax for the year 1928-29 on the basis of this income and there is no dispute as to this. But during the year 1928 the Income-tax Officer also proceeded to assess the Company to income-tax in respect of its profits for the year 1927-28 professing to act under section 34 of the Indian Income-tax Act. To this course an objection was taken on behalf of the Company that the Income-tax Officer had no legal power to proceed under that section in the circumstances of the case. Consequently on the application of the Company the following question has been referred for the opinion of this Court:—"Whether in the circumstances of this case the assessment made under section 34 for the year 1927-28 is legal." We have heard counsel for both parties and I am of opinion that our answer should be in the negative.

Now section 34 of the Indian Income-tax Act reads as follows:—"If for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year.....the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay income-tax..... a notice.....and may proceed to assess or re-assess such income, etc." The section, therefore, pre-supposes that the income, profits or gains which can be assessed under it should have been chargeable during the preceding year and also must have escaped assessment.

There is no question raised before us that the income, profits, or gains in question, if assessable were chargeable. But it is contended that they did not "escape assessment" because this expression implies that they should have been assessable which, it is further contended, means that they were capable of assessment during the previous year. Now it seems that there is a clear distinction between chargeability and assessability. The former expression cannotes liability to pay income-tax; the latter expression has reference primarily to the machinery, which ought to be utilized, and the procedure that must be followed in determining the amount which should be levied as income-tax. It, therefore, appears to me that during the year 1927-28 no machinery existed which made it possible in law for the Income-tax authorities to assess the income, profits or gains of the Company during that year.

Section 59 of the Indian Income-tax Act provides that the Central Board of Revenue may,.....make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income; it further particularly provides that it may make rules prescribing the manner in which and the procedure by which the income, profits and gains of the insurance companies shall be arrived at. In pursuance of the powers conferred upon the Central Board of Revenue rules have been framed by it and the relevant rule is rule 25 which is to be found at page 67 of the Income-tax Manual (Second edition). That rule lays down that in the case of Life Assurance Companies whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation. Now there is no question that in the year 1927-28 no profits of the Lakshmi Assurance Company had been ascertained by actuarial valuation and consequently no assessment was possible during that year under the Indian Income-tax Act according to the rule cited above. In

other words during that year there were no means provided by law for ascertaining or assessing the income of the company. But the learned counsel who represented the Income-tax Commissioner before us contended that if the actuarial valuation was not available to the Income-tax Officer during the year 1927-28 it was open to that Officer to proceed in the ordinary way, that is to say, to levy the income-tax after obtaining a return of its income from the Company as is done in the case of ordinary individuals, companies or associations, and in this connection he contended that the provisions of section 59 of the Indian Income-tax Act are enabling provisions and that it is not incumbent on the Central Board of Revenue to frame rules under that section. This is true but the Central Board of Revenue have made the rules under that section and the rule concerned is of a mandatory character. It provides the only manner in which the income, profits and gains of Life Assurance Companies can be determined. It does not give any discretion to the assessing officer to depart from its provisions and to have re-course to the other provisions of the Income-tax Act for the purpose of determining and assessing the income, profits and gains of a Life Assurance Company.

That being so, it is clear, in my opinion, that in the year 1927-28 it was not possible under the provisions of the existing law for the Income-tax Officer to assess the Lakshmi Insurance Company to income-tax. Can it, therefore, be urged that the income, profits and gains of the Company "escaped assessment" during that year as that term is used in section 34 of the Indian Income-tax Act. A thing cannot be said to escape certain consequences unless it is capable of facing or being subjected to those consequences and, as, in my opinion, the income of the Company was not capable of assessment under the rules laid down by the Central Board of Revenue, which have the force of law, during the year 1927-28 in the absence of an actuarial valuation which valuation according to the wording of rule 25 referred to above is to be utilised for assessing the income of the *succeeding years* till the next valuation is made, it cannot be said to have escaped assessment.

It is further to be noted that according to rule 25 cited above the *last preceding* valuation has to be made the basis of the succeeding assessments. In the present case there is no last preceding valuation with reference to the income which should ordinarily be taken as the basis of assessment for 1927-28.

I would, therefore, answer the question in the negative and leave the parties to bear their own costs of these proceedings.

AGHA HAIDAR, J.:—I agree.

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(388) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Mr. Justice Fazl Ali and Mr. Justice Chatterji.

(18th July, 1930).

Chinarajni Lal Gobinda Prasad .. *Assessee.*

vs.

The Commissioner of Income-tax, Bihar and Orissa.

Indian Income-tax Act (XI of 1922) Sec. 66 (3)—Assessment under Sec. 23 (4) for non-production of accounts—Sufficiency of cause—Question not raised before the Income-tax authorities—Right to call for reference.

Where the assessee assessed under Sec. 23 (4) of the Income-tax Act for non-production of account books called for under Sec. 22 (4) made no attempt to establish the truth of the allegations put forward as sufficient cause for non-production

HELD, that though in certain cases the question of sufficiency of cause might be a mixed question of law, and fact, on the facts of the case and the findings of the Income-tax authorities, there was no question of law for reference to the Court under Sec. 66 of the Act.

Kajori Mal Kalyan Mal *v.* The Commissioner of Income-tax, United Provinces 3 I. T. C. 451 *Referred to.*

Where the question that the assessment under Sec. 23 (4) was wholly arbitrary and not according to the best of the officer's judgment was not raised before the Officers of the Income-tax Department who had therefore no opportunity to deal with it adequately, an assessee will not be entitled to apply to the High Court for a reference on that question.

Application [Miscellaneous Judicial Case No. 135 of 1930] under Sec. 66 of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Bihar and Orissa, to state a case for the opinion of the High Court.

K. P. Jayaswal and *A. K. Mitter*, for the Assessees.
Assistant Government Advocate, for the Crown.

JUDGMENT.

FAZL ALI, J.:—It appears that on the 28th April, 1928, the Income-tax Officer of Champaran served upon the applicants a notice under section 22 (2) of the Income-tax Act directing them to file within thirty days a return of the income accruing to them in the Dewali year 1983-84 which corresponds to 1928 to 1929. On the 28th May the applicants filed an application for a month's time which was granted. Ultimately a return was filed by them on the 16th July which showed a loss of about Rs. 7,100. On August 27 the assessees were served with a notice under section 22 (4) to produce certain accounts by the 1st October, and they were also served with a notice under section 23 (2) to produce the evidence on which they relied in support of the return. On the 1st October they failed to produce account books and so the Income-tax Officer proceeded to assess them under section 23 (4). Against this assessment they moved successively the Assistant Commissioner and the Commissioner of Income-tax and finaly they have applied to this Court to call upon the Income-tax Commissioner to state a case under section 66 on certain questions of law.

The point to be considered by us is whether any question of law really arises in this case. There is no doubt that by failing to produce the account books as directed by the notice of the 27th August the assessees have made themselves liable to be assessed under section 23 (4) against which there is no right of appeal. The only question which was raised by them before the Assistant Commissioner and the Commissioner of Income-tax was whether or not there was sufficient cause to prevent them from producing the account books which they had been called

upon to produce. The plea taken by the assessees was that the books of account were not with them but were in Rajputana and the time that was allowed to them was not sufficient to produce those books. It appears that the Income-tax Officer in dealing with this question said clearly in his order that no attempt had been made by the assessees to establish the truth of their allegations. The Commissioner of Income-tax also has observed in his order that the assessees had failed to prove that the books had actually been sent to Rajputana. It is true that a post card was shown to the Commissioner of Income-tax for the purpose of showing that the financing partner of the firm of the assessees had gone abroad on pilgrimage; but as the Commissioner of Income-tax has rightly observed no additional evidence could have been taken at that stage and the post card by itself did not prove much. We do not think in the circumstances we can go behind the findings of the various officers of the Income-tax Department that the assessees have failed to establish that they had been prevented by sufficient cause from producing their books of account. The learned Counsel for the petitioners relies on the decision in *Kajori Mal Kalyan Mal* v. *Commissioner of Income-tax, United Prvinces* (1) for the proposition that in certain cases the question what is a "sufficient cause" may be regarded as a mixed question of law and fact. That may be so. But I do not think in this particular case it can be regarded as anything else than a pure question of fact.

The next question which was urged by the learned Counsel for the petitioners was that in this particular case the assessment was wholly arbitrary and that, as was observed in *S. P. K. A. A. Chettyar Firm* v. *The Commissioner of Income-tax, Burma,*(2) when section 23 (4) says that the Income-tax Officer shall make the assessment "to the best of his judgment" it means that he must make it according to the rules of reason and justice, not according to private opinion; according to law and not humour, and that the assessment is to be not arbitrary, vague and fanciful but legal and regular. It was also urged that in that case it was held by the High Court of Rangoon that the High Court had power to hold that what purports to be an assessment to the best of the Income-tax Officer's judgment was not in fact such an assessment, and was, therefore, not a legal assessment. Now, as at present advised I do not think it is necessary to differ from the view taken by the Rangoon High Court on that question. But the difficulty with which the present applicants are faced is that in their own application which they have filed in this Court no such question of law has been formulated at all and at any rate before we in this Court can go into that question, there must be definite materials before us for coming to the conclusion that that question had been raised before the officers of the Income-tax Department and they had opportunity to deal with it adequately and to show that the assessment had not been made in a capricious manner. In my opinion this application must be dismissed, but in the circumstances of the case there will be no order as to costs.

CHATTERJI, J.:—I agree.

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(1) 8 I.T.C. 451. (2) 4 I. T. C. 182.

(389) IN THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.

Before Mr. Wild, Judicial Commissioner and Mr. Rupchand Bilaram, Additional Judicial Commissioner.

(18th July, 1930)

Husseinbhoy Mahomedbhoy .. *Assessee.*

vs.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 66 (2) and (3)—Limitation for Reference application—Exclusion of date of appellate order—Businesses at different places—Joint assessment—Question of proprietorship, if one of law for reference—New questions, referability of.

In computing the period of one month prescribed by Sec. 66 (2) of the Income-tax Act the day of the passing of the order under Sec. 30 or 31 of the Act should be excluded and consequently an application to the Commissioner of Income-tax made on the 26th July, 1928 to refer a case in respect of an order of the Assistant Commissioner passed on the 26th June is within time.

The assessee and his brothers were owners of a firm at Kutch Mandvi started in S. 1959. Some 4 years later under the same name another firm was started at Karachi which was claimed to belong solely to the assessee. Till 1926. the Karachi firm was assessed as assessee's, the dealings between the Katch Mandvi firm and the Karachi firm being treated as principal and commission agents. In 1927-28 the Income-tax Officer on a consideration of several facts, inter alia the common firm name, entries of Profit. and Loss accounts in the same name in both the firm's books, etc., came to the conclusion that the proprietors of both the firms were the brothers and made an assessment on the Karachi firm as the main firm managing the Kutch Mandvi firm. On an application to the High Court for a reference,

HELD, that the only question arising in the case, namely, whether the proprietors of the two firms were the same and the Kutch Mandvi business a branch business, being a question of fact, an application for reference was unsustainable, however, erroneous the findings thereon might have been.

A question not raised before the Assistant Commissioner or the Commissioner cannot be raised in an application to the High Court under Sec. 66 (3) of the Act.

Application [Miscellaneous Application No. 52 of 1929] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Bombay to state a case for the opinion of the Court.

JUDGMENT.

Two preliminary objections have been raised. The first is as to the jurisdiction of this Court, and that is covered by our decision in Miscellaneous Application No. 23 of 1929. The second objection is that this application is out of time.

It appears that in this case the order of the Assistant Commissioner of Income-tax complained against was passed on June 26, 1928 and the application made to the Commissioner of Income-tax to refer the questions of law to this Court was made on July 26th, 1928. It is argued that prior to the amendment of section 66 by Act XXII of 1930 the period of limitation for applying to the Commissioner to refer the matter to the Court was one month only. It is said that this month should be computed from June 26 to July 25 and that the application to the Commissioner was therefore late by one day.

On behalf of the assessee our attention has been invited to several rulings of different High Courts in which a liberal construction has been put upon the provisions of this section and it has been held that time should run not from the date of the order complained of but from the date of its communication to the assessee and that time taken by the assessee in obtaining a copy of the order complained of should likewise be allowed. It has been said that the order was not communicated to him till June, 30 and that it took him some further time to obtain a copy of the order. Reliance has also been placed on the provisions of section 29 of the Limitation Act. But it is not necessary for us to go into these points in the present case, as it is well settled that as a general rule, to which there are however certain exceptions, in computing the period within which an act is required to be done, the day from which such period is to be calculated should be excluded. This applies equally to the provisions contained in that behalf in a contract or other writing executed by a party as those contained in a statute Halsbury Laws of England Vol. 27 paras 888, 889. In the leading case of *Lester v. Garland,* (1) an act was required to be done within six months after the death of the testator which took place on 12th January of a particular year. It was done on the 12th of July of that year and was held to be in time. At page 257 the Master of the Rolls has said:—"Upon technical reasoning it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded, than that in all cases it should be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in compass of it, is no more referable to any one than to any other portion of it, but the act and the day are co-extensive and that therefore the act cannot be said to be passed until the day is passed. The day of the testator's death is the time of his death and that time must be passed before the six months begin to run. There seems to be no other alternative but either to take the actual instant, or the earlier day as the time of his death. If the whole of the day on which the death occurred were computed as one of the days subsequent to the death, we should be throwing back the event into a day on which it did not happen. To include the day of the occurrence is to begin the computation from the preceding day."

This rule has been universally followed and has been adopted in section 12 of the Limitation Act. It applies to the Income-tax Act irrespective of the provisions of the Limitation Act.

An argument was advanced that the words of the section are within one month "of the passing of the order" and not "from the passing of the order." But the use of the expression "of" makes no difference whatsoever. As a matter of fact in *Ex parte Fulton*(2) which is the earliest of the series of English cases on the point the expression used by the statute was "within 20 days of the execution" and the same rule was applied.

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(1) (1829) 9 B. & C. 134 S C 15 Ves. 248, 257.

The one month in this case which means the calendar month should therefore be deemed to have commenced from June 27 and to have ended on July 26.

For these reasons we hold that the application made to the Commissioner for a reference to this Court was made within the time allowed by the section.

On the merits we think that the assessee has no case and that no question of law is involved which could legitimately form the subject of a reference to this Court. From the facts stated by Mr. Kimatrai, on behalf of the assessee, it would appear that there is a firm of Mahomedbhoy Sheikh Adambhoy at Kutch Mandvi. It consists of three brothers as owners. It is said that that firm was started in Sambat 1959. There is a firm in Karachi of the same name, which, it is alleged, was started in Sambat 1973. But it is contended that the Karachi business belonged solely to Hussainbhoy, the applicant, who is the son of Mahomedbhoy and who is the eldest brother. The Karachi firm has from time to time been assessed to income-tax by the Income-tax Officer, Karachi, and upto the year 1926. the statement made by Hussainbhoy that the dealings between the Karachi firm and the Kutch Mandvi firm were those of principal and commission agent has been accepted. The Karachi firm has been taxed on the commission said to have been earned with regard to the Kutch Mandvi business. But in the year 1927-28 the Income-tax Officer seems to have entertained a different view. He was of the opinion that the proprietors of both the firms were the same, namely, the three brothers and that the eldest brother who admittedly lived at Karachi managed the Kutch Mandvi business from here, the latter business being part and parcel of the Karachi business. He therefore proceeded to levy the tax upon the Karachi firm on that basis, holding that the Karachi firm was the main firm and managed the business of the Kutch Mandvi firm. In coming to that conclusion, he applied his mind to several factors which were brought to his notice. He gave effect to a recital in the deed of sale executed in favour of two brothers who were shown to be residing in Karachi. He took into consideration several facts referred to in the appellate order, *inter alia* the facts that the business at both places was carried on in the same name and that the entries of profit and loss account as also receipts and out-goings of the Kutch Mandvi business appeared in Karachi books in the same name, namely of Mahomedhoy Sheikh Adambhoy. There was also a definite statement on the record made byHusseinbhoy to the effect that the whole-sale business in sugar and matches in both places belonged to him meaning thereby to him and to his two brothers.

In the application to the Commissioner of Income-tax asking him to refer alleged questions of law the applicant propounded his questions as follows:—

(*a*) Whether or not the finding of the Income-tax Officer in the course of the assessment proceedings for 1923-24 that the ledger account between the Kutch Mandvi firm of Messrs. Mahomedbhoy Sheikh Adambhoy and Mahomedbhoy Sheikh Adambhoy of Karachi was of the nature of a banking account which finding has been acquiesced in, in the assessment years 1924-25 and 1925-26 is not *res judicata* now.

(*b*) Whether the word "person" occurring in section 4 (2) of the Act refers to the same individual having business in British India and abroad.

(*c*) Whether in order to assess income-tax on a person residing in British India in respect of any alleged profits from a foreign business it is not essentially necessary to come to a finding in view of proper evidence that the person resident in British India carries on and controls the foreign business and whether in your petitioner's case there was evidence for such a finding.

(*d*) Whether the burden of proving that the Kutch Mandvi firm which had hitherto in the past been held to be a distinct firm, having absolutely nothing to do with the Karachi business of your petitioner was a branch of the Karachi concern lay upon the Income-tax department or your petitioner and whether the Income-tax Department had discharged it and if so on what evidence? If the onus lay on your petitioner whether he has not satisfactorily discharged it by producing account books which explain the nature of transactions between the two concerns most satisfactorily.

(*e*) Whether in view of the entries in the capital account of the Karachi concern of your petitioner the annual profit and loss statement and the nature of the transactions as revealed by the ledger account of the Kutch Mandvi firm there was any legal justification for holding that the Karachi concern controls the Kutch Mandvi firm and receives profits of the latter firm in Karachi so as to be liable under section 4 (2) of the Indian Income-tax Act 1922."

We have heard Mr. Kimatrai on all these questions and we can find nothing in them amounting to a question of law which should be referred to the Court, when the simple question which the Assistant Commissioner was called upon to decide was whether Karachi was the principal place of business of the firm of Mahomedbhoy Sheikh Adambhoy and the business at Kutch Mandvi was its branch or not. Collaterally the Income-tax Officer had to decide whether all the three brothers were owners of the business carried on at both places, or that all of them were partners in the Kutch Mandvi business and only one of them in the Karachi business.

Although the Assistant Commissioner has given no definite finding that all three brothers were partners in the business carried on at Karachi and at Kutch Mandvi, he has come to a definite conclusion that the proprietors of the business carried on at both places were the same and that the Kutch Mandvi business was a branch business. These are findings of fact which are not subject of revision by this Court however erroneous they may be.

In the application filed in this Court under section 66 clause (3) of the Income-tax Act, the assessee has raised a further point which reads as follows:— "(*f*) and whether in any case the balance at the foot of the ledger account of the Mandvi firm which included on the credit side monies received from merchants at Bombay and elsewhere can be treated as profits and gains in the absence of a balance sheet of the Mandvi firm, the Karachi balance sheet showing a loss of Rs. 13,685 which has been admitted to be correct." This was not a question raised before the Assistant Commissioner or before the Commissioner and it is not open to the assessee to raise it here. Apart from this, it would appear that the question whether the balance at the foot of ledger account which includes credit entries of moneys received from merchants of Bombay and other places should be treated as profit in the business or not would depend considerably upon the facts of each particular place and in the absence of production by the assessee of the books of his Mandvi firm, it was perhaps open to the Income-tax authorities to find out the profit of the assessee by some rule of thumb.

We accordingly dismiss this application with costs. Pleader's fee to be taxed according to the ordinary scale provided for Miscellaneous Applications made to this Court.

(390) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(24th July, 1930).

Maharajadhiraja of Dharbhanga .. *Assessee.*

vs.

The Commissioner of Income-tax,

Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 9 (1) (vi) and (vii)—Residential houses kept open for occupation—Vacancy allowance for non-occupation, if claimable—Allowance of collection charges, admissibility of.

Where the assessee, a wealthy nobleman, owned residential houses in various parts of the country kept open for his occupation at any time he might choose, he is not entitled to the vacancy allowances under Sec. 9 (i) (vii) of the Income-tax Act in fixing the annual value of houses not used by him during the year, nor to any allowance of collection charges under Sec. 9 (i) (vi).

Case [Miscellaneous Judicial Case No. 34 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa for the opinion of the High Court.

CASE.

The questions stated below for your Lordships' decision arise out of the assessment order passed in the year 1927-28 by the Assistant Commissioner of Income-tax Patna Range, exercising the powers of an Income-tax Officer under special authority vested in him by me by an order passed under section 5, sub-section (4) of the Income-tax Act (XI-22) and the appellate order passed by me on the appeal arising out of that assessment.

2. Assessee owns a residential house at Ranchi, one at Simla and one at Kankhal near the sacred town of Hardwar and in calculating the annual value of these three houses both the Assessing Officer and the appellate authority refused to grant any deduction in respect of vacancies under section 9 (1) (vii) of the Income-tax Act. In this connection, the assessee has asked that the following question of law should be stated:—"Whether under the law allowances are to be given in respect of vacancies under section 9 of the Act in fixing the annual value of houses not used by the assessee during the year."

3. My own view on this question is that a vacancy allowance is to be granted only in the case of houses which are intended to be let and not in the case of houses which are intended for the occupation of the assessee and these three houses are intended for assessee's occupation. All three are furnished: One is situated near a place sacred to Hindus, one at the summer capital of the Government of India, of the Council of State of which assessee is a member, and one at the summer capital of the local Government. No attempt has ever been made to rent or let these houses. They have never been advertised for letting and the conclusion to which I am forced is that they are intended for assessee's own use and the fact that, in the year on the income of which he is being assessed, he did not actually visit any of these three places does not affect the question at all.

Section 9 (1) (vii) under which the allowance is claimed runs as follows:—"in respect of vacancies, such sum as the Income-tax Officer may determine having regard to the circumstances of the case." And, I am of opinion that the expression "having regard to the circumstances of the case" occuring in that sub-section is very pertinent and gives the Income-tax Officer discretion to refuse to give any set off against vacancies in any case of this sort. I am fortified in this view by the decision of the Madras High Court in the case of *Raja of Pa,lakimedi* v. *The Commissioner of Income-tax, Madras,*(1) the facts of which are similar to the facts in this case.

4. Assessee owns a large number of residential houses intended for his own occupation at different places in India and he claims that under section 9 (1) (vi) of the Act he should be allowed as a set off from the income the collection charges in respect of these houses when fixing their annual value. The question of law arising out of this matter which he has framed is as follows:—"Whether allowance of collection charges is to be made in respect of residential houses in fixing their annual value under section 9 of the Act."

5. It is to be noted that the question as framed does not refer to the collection charges incurred, for obviously no collection charges are incurred in the ordinary sense of the term. Assessee's argument apparently is that for the purpose of placing one's income from house property occupied by oneself on the same basis as the income from house property leased out, the collection charges notionally incurred in respect of house property occupied by assessee himself should be allowed. I am unable to visualize notional charges incurred in these circumstances and in my view the expression 'in respect of collection charges' in the clause referred to above must mean the actual collection charges. Further, under this sub-clause as interpreted by me, the assessee is actually placed in the same position in regard to house property occupied by himself as in the case of house properties leased to others, for what is arrived at in both cases is the actual value of the property to the assessee and obviously no expenses of collection can be incurred where no collections have to be made. In my view therefore both this question and the first question framed should be answered against the assessee.

6. The assessee had, in the year of account, two indigo factories in the Purnea District, one at Khaja and one at Bahora. In respect of the former, he claimed a loss of Rs. 31,179 but was allowed a loss of Rs. 8,537 only and in respect of the latter he was allowed a loss of only Rs. 921. The losses arrived at as noted above do not take into consideration depreciation on plant, machinery and buildings. Now, under section 10 (2) (vi), depreciation can be allowed only if the particulars prescribed by statutory rule 9 have been supplied. These particulars have not been supplied but instead the assessee has filed a current valuation of the plant and buildings as made by the local District Engineer. This gave no details whatever of the basis on which this valuation was arrived at, particularly in the case of machinery and no effort was made to produce evidence of the original cost before the Assessing Officer. After the appeal had been finally heard by me, assessee submitted the original deed of conveyance of the year 1900 by which this and other property was conveyed to him for the sum of five lakhs of rupees. An examination of the document, however, showed that by that deed was conveyed not merely these two indigo factories but five main indigo concerns including 15 sub-concerns of which these are two, while further it also conveyed a large area of Patni land and one or two zemindari Mauzas. It is evident therefore that apart from the fact that it was put in not merely

after the assessment was made but even after the appeal was heard, it is of no value in arriving at the cost of the plant and machinery in these indigo concerns.

7. Assessee claims that the loss resulting from depreciation should be set off against his total business profits and the question which he has framed in this connection is worded as follows:—"Whether loss resulting from depreciation is to be deducted from the total business profits during the year, or is to be confined to a particular branch under the head business."

8. This question appears to me to be of only academic interest in this case, because assessee cannot in the circumstances be allowed depreciation not having supplied the particulars required by statutory rule 9 read with section 10 (2) (vi) proviso (a) of the Act, but as assessee asks for your Lordships' decision on the point, I submit my opinion below.

9. Assessee has many businesses, but there can be no doubt that the indigo business carried on by him is a distinct business, for it has no inter-connection or inter-dependance with the other businesses of the assessee. Assessee's main principal place of business is Darbhanga but this business is carried on in the Purnea District, the accounts thereof are maintained in the Purnea District and they are not even submitted to the head office at the close of the year, for when they were produced before me in connection with the appeal arising out of the assessment made in the year 1926-27, they were brought from the indigo factory by the Manager of the Indigo Concern and were not brought from the head office.

10. Assessee claims that the amount by which the debit side of his profit and loss statement of these indigo concerns exceeds the credit side as the result of depreciation to be written off should be allowed under section 24 of the Act as a set off against his profit from other business activities.

11. Section 10 of the Income-tax Act (XI-22) enacts that "tax shall be payable by an assessee under the head 'business' in respect of the profits and gains *of any* business carried on by him" and under sub-section (2) of that section, "*such profits* and gains shall be computed after making the allowances" provided therein. One of such allowances is in respect of insurance against risk of damage or destruction of buildings, machinery, plants, etc., used for the purpose of the business: section 10 (2) (iv). "The business" referred to in my view means "any particular business of which the profits and gains are being computed." Lower down comes another allowance, *viz.*, "in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee"—section 10 (2) (vi) and proviso (b) to that clause enacts that "where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given shall be added to the amount of the allowance for the following year." "Such buildings, machinery, etc." in the above clause clearly mean "buildings, machinery, etc., used for the purpose of the particular business of which the profits and gains are being computed" and "no profits and gains" in the proviso similarly means "no profits or gains of the particular business of which the financial results are being computed." It appears to me therefore that tax is payable in respect of the profits or gains of each separate business and that under sub-clause (2) of that section, the profits and gains of each separate business must be computed separately. In computing the profits of each business, the allowance for depreciation provided for by

section 10 (2) (vi) should be allowed to the extent to which there are profits available in that business and the balance should be carried forward to the next year—Proviso (b) to section 10 (2) (vi). The special provision in the Act to the effect that such excess depreciation should be carried forward to the next year shows that the excess is not a loss of profits or gains to which the principle of section 24 can be applied.

12. The assessee, in the year 1923-24 for the first time specifically advanced the contention that in the 'previous year' that is in the year 1329-F, he had a "business" in stocks and shares and he made the same claim in the three following years and claimed that he should be allowed as a deduction from his taxable income the amount by which the value of his shares at the end of his business year had depreciated as compared with their value at the beginning of the year. This contention was not accepted by the Income-tax Officer or the Assistant Commissioner but was eventually accepted by the Commissioner with the result that deductions from income of the following sums representing depreciation in the value of stocks and shares were allowed in those years:—

1923-24 Rs. 4,38,324.

1924-25 More than 30 lakhs.

1925-26 Rs. 35,53,284 subsequently reduced to Rs. 12,58,192 as the result of a supplementary assessment under section 34.

1926-27 about Rs. 2,50,000.

13. When the assessment was being made in the year 1927-28 that is the assessment out of which this statement of case arises, the assessee refused to submit any statement of the valuation of shares at all though specifically asked to do so on the ground that he had been closed his business in stocks and shares and the Assessing Officer calculated appreciation to the best of his ability. He found that in the case of quoted shares held by the assessee the appreciation was more than 23 lakhs and as there was a general improvement in the value of shares in that year, he added 3 lakhs for non-quoted shares and I upheld that order in appeal.

14. Arising out of this matter, the assessee has framed three questions as quoted below:—

(1) "Whether in law it is maintainable that until shares which had been originally held as mere investments and then as stock-in-trade of a speculation share business are finally disposed of, the shares are to be valued at the beginning and the close of the year for computing profits to be taxed, even though the business is not carried on during the year of assessment or stopped altogether."

(2) "Whether a business which is not closed but which has not been carried on during the year is open to assessment at all."

(3) "Whether or not in law share and speculation business will be considered as closed when no transaction at all has taken place during the year."

15. In my view, the first question cannot be accepted as drafted, for it assumes that the business in stocks and shares was not carried on during the year of account and that is exactly the point at issue. The same criticisms can be levelled against the 2nd question as formulated and in my view these three questions resolve themselves into the simple question "had the assessee or had

he not a business in stocks and shares in the year of account." This question is, in my opinion, a question of fact and of accountancy, but I place it before your Lordships so that you may decide it if you adopt the view that it is a question of law.

16. It is not strictly true that no transactions in the purchase of stocks and shares took place in the year of account, for in that year assessee purchased debentures to the value of 17 lakhs in the Darbhanga Spinning and Weaving Company Limited. It is explained that this purchase was made for the purpose of acquiring a controlling interest in the company which was ultimately compelled to go into liquidation, the whole concern being subsequently purchased by the assessee. This may be so, but the fact remains that in the year of account investments to the extent of 17 lakhs were made, investments too of a very speculative nature.

17. I find further that in the following year, that is, in the year of account on which assessment was made in 1928-29 assessee's activities in this connection have been considerable. In that year, he purchased shares to the extent of Rs. 1,50,000 in the Darbhanga Sugar Company Limited, Lohat, 1,500 shares of Rs. 1,000 each in Villiers Ltd. He invested Rs. 75,000 in shares in Dharmasi Morarji Woollen Mills Ltd., Rs. 12,500 in Sasaram Lime shares and Rs. 25,000 in Hoogly Flour Mills, while Rs. 4,50,000 has been invested in the New Darbhanga Cotton Mill. Again, in that year, he purchased debentures to the value of 8 lakhs in Bharat Abhyudaya and one lakh in C. T. Paper Board and Rs. 5,72,000 in Eastern Coal Syndicate. He also sold in that year 208 shares of the value of Rs. 1,45,000 in Tata Hydro Power Supply Company.

18. In the course of these proceedings, the assessee at first contended that the business closed at the beginning of 1333 F that is, in October, 1925, but later argued that it closed sometime in the course of that year. Income-tax was not charged on this business under the Act of 1918. Assessee has claimed that his share business was recognised even when the old Act was in force, but he has advanced no evidence in support of that contention and a reference to a report on the file dealing with the assessment of the year 1917-18 onwards shows that while in certain of these years assessee was allowed a set off of certain losses resulting from the liquidation of Banking companies, he did not in any of those years return the profit resulting from the sale of appreciated shares and did not submit in any year a statement showing the amount by which the shares held by him had appreciated in the course of the year. This obviously he should have done if he claimed that he had a business in stocks and shares.

19. As income-tax was not charged on the profits of this business under the Act of 1918, it was the assessee's duty to give notice to the Department of the discontinuance of the business within 15 days thereof under section 25 (2) of the Act of 1922, but though assessee engages the best legal advisors in the province for income-tax cases, no such notice was given. The 'previous year' in this case ended in October, 1926 and this point that is, that his business had closed was first raised by the assessee in the course of the assessment year 1927-28 and about the middle of the 1927. Again, in connection with the appeal arising out of the assessment made in 1926-27 which was heard by me in March, 1927, assessee filed two written statements signed by his two financial advisors, Mr. Davar and Mr. Lovett, in both of which it was categorically stated that assessee then (March, 1927) had a business in stocks and shares. These two statements are appended and marked A* and B.*

* Not Printed.

20. When the case was before me on appeal, assessee argued that he must be held to have closed his business in stocks and shares, because he had dispensed with the services of his two financial advisors, Mr. Davar and Mr. Lovett. Assessee's year of account, however, in this case, ended in September, 1926, and assessee's ledgers showed that Mr. Lovett was paid a monthly salary up till August, 1927, while Mr. Davar drew pay at least up till June, 1927. I find as a fact therefore that assessee had in the year of account with which this assessment deals, a business in stocks and shares.

21. Assessee cannot be allowed to take up the position that he had such a business in those years in which it is profitable for him to do so and then to contend in a subsequent year that he has closed his business when his shares have appreciated in the 'previous year.'

22. Arising out of this matter, the assessee has framed a further question of law:—"Whether a notice under section 25 (2) is necessary while the head of income or profits under business continues and only some particular branch thereof has been discontinued."

23. This question is based on the assumption that assessee's various business activities are all branches of the same business. This, however, is not correct. I have given reasons in paragraph 9 above for the view that assessee's indigo business is an independent business, in no way connected with his other business activities and the same is the position in regard to his business in stocks and and shares. Separate accounts are kept of his business in stocks and shares and a special staff is maintained for carrying on that business, and it is in no way connected with or inter-dependent with his other business activities.

24. Under Sec. 10 (1), "the tax is payable by an assessee under the head 'business' in respect of the profits or gains *of any* business carried on by him and under Sec. 11 (1) it is payable under the head 'professional earnings' in respect of the profits or gains of any profession or vocation followed by an assessee," while Sec. 25 (2) runs as follows: "Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such discontinuance within 15 days thereof." "Any such business" in Sec. 25 (2) refers back to the phrase 'any business' in Sec. 10 (1) and as used there must have the same meaning as the phrase 'any business' in Sec. 10 (1) and for the same reasons for which I hold in paragraph 11 above that 'any business' in Sec. 10 (1) means "each separate business," I hold that the expression 'any business' in Sec. 25 means the same. In my view, it was incumbent on the assessee in this case to give notice under Sec. 25 (2) of the Act if he had really closed his business in stocks and shares as he contends.

25. The following further question has been formulated: "Whether valuation of shares can be made for depreciation or appreciation to determine profits or loss under the Income-tax law".

26. Assessee apparently argues that even though he is held to have had a business in stocks and shares in that year, even then for the purpose of determining his profits arising from this business his shares at the beginning and the end of the year should not be valued. This is a heresy. As soon as it is admitted or held that an assessee has a business in stocks and shares, those stocks and shares become his stock-in-trade and are to be dealt with just in the same way as the stock-in-trade of any business man and, this being so, the stock-in-trade must be valued at the beginning and end of every business year

until it is finally disposed of. Further, the method of valuation employed in this case is the method accepted by the assessee when he first raised the contention in the year 1923-24 that he had a business in stocks and shares and it is the method the application of which has resulted in enormous deduction being allowed in the intervening years which I have referred to above in paragraph 12. Assessee therefore in my view cannot now turn round and say that no such valuation can or should be made.

27. It is respectfully urged therefore that all the questions as formulated should be decided in favour of the Department.

K. P. Jayaswal and *Murari Prasad*, for the Asseesee.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—Various points are raised by this letter of reference. As to some no decision is called for by us because the learned Assistant Government Advocate stated that the Department is prepared in future to accept a certain view of the law with which view the assessee is in agreement and as to some a compromise has been effected and therefore we were not troubled to come to any decision. The remaining two points are of a very simple character.

The assessee is a wealthy nobleman of this province and he has in various parts of the country residential houses which he keeps open for his occupation and residence at any time he might choose. He is not in the habit of letting any of these residences to tenants but keeps them furnished so that if at any moment he may choose to enter into residence he is free to do so. As to some of the residences he has not resided in them during the year of assessment, nor has he used them for purposes of hospitality.

The first point arises by reason of claim on behalf of the assessee under section 9 sub-section (1) (vii) of the Act to make a deduction from the annual value of these particular houses of a sum in respect of the periods during which he did not use them for purposes of residence, and he claims that such periods should be included in the term 'vacancies' in that paragraph. It is argued on his behalf that a house may well be occupied (and it is admitted that in this case the houses in question are and have been in his occupation) but that a house although it may be occupied may nevertheless be vacant. In my opinion the contrasting terms are "occupation" on the one hand and "non-user" or "unused" on the other and a house, although it may be occupied may in certain circumstances be unused but it cannot be occupied by the owner and at the same time be vacant. In my opinion the provision in section 9 (1) (vii) is intended to apply primarily only to those cases in which the house in question is not in the occupation of the owner but is habitually let to tenants and the vacancies referred to are vacancies between the different tenancies. It may also be applied to cases where a house though not let is dismantled and shut up by the owner but it has no application to the circumstances of the present case.

The first question put to us is "whether under the law allowances are to be given in respect of vacancies under section 9 of the Act in fixing the annual value of houses not used by the assessee during the year". I would answer this question in the negative.

The second question submitted to us is whether the assessee was entitled to deduct a sum from the annual value as collection charges under section 9 (1) (vi). It is argued that inasmuch as sub-section (2) of the Act defines the 'annual value of the house as the sum for which the property might reasonably be expected

to let from year to year' and that that is in the nature of notional income, the assessee should be entitled to deduct from such notional income measured by the value for letting purposes a sum which should represent the cost of collecting the rent if the house were so let. But the answer to this contention is, in my opinion, that even in the case of a house which is in fact let, the proper construction of paragraph (vi) is that collection charges may not be deducted unless they have actually been incurred, and in that case the sum which may be deducted is limited to a sum 'not exceeding the prescribed maximum'. Analogy may be found for this reasoning from the construction of paragraph (iii) which allows the deduction of any annual premium paid to insure the property against risk of damage or destruction. It is quite clear in this case that the premium could not be deducted unless it had been actually paid. Similarly in respect of paragraph (iv) which allows the deduction of interest on mortgages or charges, the deduction may not be made unless either the interest on the mortgage or charge has actually been made, or unless the assessee is under a legal liability to pay the interest. I would therefore answer the question put to us "whether allowance of collection charges is to be made in respect of residential houses in fixing their annual value under section 9 of the Act" in the negative.

These two points conclude all the matters with which we have had to deal in this reference.

We award Rs. 100 as costs to the opposite party.

DHAVLE, J.:—I agree.

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(391) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(28th July, 1930).

Maharani Janki Kuer (through the Manager, Bettiah Court of Wards) .. *Assessee.**

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 2 (1) and 4 (3)—Licenses for removal of brick earth and manufacturing brick—Rents and Royalties payable therefor, Assessability of—If capital receipt—Exemption as casual income or agricultural income.

Rents and royalties received by a land-owner under licenses granted by him to brick-makers to erect brick kilns on his land and to take away earth for manufacturing bricks are income assessable to income-tax and are neither capital receipts, nor income of a casual and non-recurring nature, nor agricultural income exempt from assessment under Sec. 4 (3) of the Income-tax Act.

Case [Miscellaneous Judicial Case No. 119 of 1928], stated under Sec. 66 (2) of the Indian Income-tax Act (X of 1922), by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

The assessee, in this, who is the proprietress of the Bettiah estate under the management of Court of Wards, in the year 1926-27, returned an income

of Rs. 1,50,462, while she was assessed by the Income-tax Officer, Champaran, on a total income of Rs. 2,26,276, this assessed income being made up as follows:—

	Rs.	a.	p.
(1) Income from Cowrie collections in Bazaars in villages leased out in thicca and held khas ..	28,665	3	0
(2) Income from Cowrie collections in Melas and Golas ..	1,259	0	0
(3) Income from bone Mahal ..	522	0	0
(4) Income from Gharsa Mahal ..	5,867	8	0
Mukharrari villages.—			
(5) Income from Cowrie collections ..	7,511	8	0
(6) Other non-agricultural income (including income from royalty on lime, stone and bricks 1,312) ..	30,533	2	0
(7) Interest on Securities ..	1,20,836	0	0
(8) House property rented ..	7,508	0	0
(9) Other house property ..	23,571	0	0
Total ..	2,26,276	0	0

2. The Assistant Commissioner on appeal reduced the taxable income by Rs. 5,500, being the amount received in the previous year by the assessee as bonus on conversion of certain Government Securities on the ground that this was realisation or receipt of capital and not of income.

3. The assessee owns a large estate part of which is held Khas, part is let out under temporary leases to thiccadars and part let out on permanent leases to Mukarraridars. The thiccas are of recent origin, while the Mukarrari leases were granted about the years 1887-88.

4. As stated above, the total taxable income of the assessee, as computed by the Income-tax Officer, includes a sum of Rs. 1,312, which is primarily royalty on bricks manufactured within the estate, and it is claimed that this income is non-taxable on the ground that it is of a casual or non-recurring nature, or, in the alternative, is income arising from the use and occupation of land and therefore not liable to assessment.

5. The question of law which arises in this connection may be formulated as follows:—

6. "Is the income of the assessee from the manufacture of bricks assessable to income-tax, or, on the other hand, is it non-assessable as being of a casual and non-recurring nature, or, in the alternative as being income arising from the use and occupation of land and therefore agricultural income?"

7. It was argued before me at the time of hearing this case that the rate or royalty charged (Assessee's receipts show the use of the word 'royalty') was charged not on the number of bricks manufactured, but at a certain rate per superficial area of ground from which earth was extracted for brick making: But, as a matter of fact, assessee's own documents which I called for in this connection do not support this contention. The royalty is charged not on the

superficial area, but on the cubic content of earth extracted for brick-making purposes and the rate is Rs. 5 per cubic area of one bamboo in length by one bamboo in breadth by one foot deep in the case of royalty land, Rs. 10 in the case of Ghairmazrua Malik land while double these rates are charged if earth is extracted to a depth of two feet and that this is the basis on which royalty is charged is proved by assessee's own table of rates as well as by receipts granted to brick burners.

8. This income is not of a casual or non-recurring nature, for income from this source is collected by the assessee every year and has been regularly taxed in past years. Further, it cannot, in my view, be agricultural income. It is not derived from land used for agricultural purposes as such and while it is true that agricultural rent has been interpreted in a wide sense and held by your Lordships to include even mutation fees, the reason for that view is that mutation fees are paid by virtue of the relationship subsisting between agricultural tenant and landlord, while the royalty in this case is not paid by the agricultural tenant at all, (or at any rate not by the agricultural tenant as such) but by a third party.

9. Your lordships' decision in the reference case of *Maharaja Guru Mahadeo Asram Prasad* v. *Commissioner of Income-tax*(1), would appear to have some bearing on this point. There your Lordships held that the income derived from Nimksayer is taxable on the ground that it was of a recurring nature, was not casual, and that it was impossible to distinguish rents or royalties arising from this source from the rents or royalties arising from the letting of coal or other mineral in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface, provided that it is not non-recurring and casual and provided that it is not in the nature of a sale. In my view, the quality of earth required for making bricks is in reality in the nature of a mineral and the income received from that source by the assessee is royalty in the ordinary sense of the word, as indeed it is designated by the assessee herself in this case.

10. The next question for the decision of your Lordships is "whether the income derived from what is technically called the Hadi and the Charsa Mahal, is or is not taxable."

11. The assessee, in this case, has been assessed on an income of Rs. 522 arising from the Hadi Mahal and on an income of Rs. 5,876-8-0 arising from the Charsa Mahal. The right to collect this income over a certain area is let out to thiccadars for a term of years, and in a lease in respect of the Madi Mahal which has been produced by the assessee, executed in favour of one Sheikh Jawad Husain, the right is described as the right to claim, collect and appropriate bones of dead animals in all the villages situated in a certain area. This is obviously an incorporeal right, pure and simple, and can, in no sense, come within the definition of agricultural income. Further, it is *ex hypothesi* not of a non-recurring nature, for the lease is granted for a number of years and assessee has been already taxed on this income for a number of years.

12. Similarly, the right to the skins in a certain area is given on thicca. In this connection, it was argued by the assessee that the right to collect revenue directly or through thiccadars from this source arose from the fact that dead animals were skinned on the ghairmazrua Malik land in the village.

(1) 2 I.T.C. 281.

This assumes however, that sick animals when they find death approaching conveniontly come to the ghairmazrua land to die or, on the other hand, that if they die elsewhere, they are dragged to the ghairmazrua land for skinning. Obviously, this is impossible in the case of heavy animals, particularly in the rainy season, and animals are ordinarily skinned where they die. Again, the amount which the thiccadar pays from this source bears no relation whatever to the amount of ghairmazrua land in the village, as one would expect if this income arose from the use and occupation of land, but, on the other hand, is calculated at the rate of 0-4-0 per cent on the total jama of the village. In support of assessee's contention, she puts in a lease executed by one Mr. Brooke in which the following words occur: "Iswaste ekrar motabar karte hain wo likh dete hain ke man thiccadar ba-jamabandi Sharact mundarje kabolait haza copar shai thiccadari ke kabiz wo dakhil rahkar Chamaran ko razi wo shakir rakh-kar charsa hasab lagan moaiyana ba-ewaz khiraj zmin lia karenge."

13. It is argued that the expression "Hasab lagan moaiyana ba-ewaz khiraj zamin" means "according to the fixed rate in lieu of rent of the land" and therefore implies that what the thiccadar pays is rent for land. "Hasab lagan moyaiyana", however probably refers to the percentage quoted above and if "be-ewaz khiraj zamin" means "in lieu of or instead of the rent of the land" then it means exactly the opposite of what the assessee contends.

14. As stated above, the assessee derives a large income from Bazars, Golas and Melas, part of which is ground rent, while part is technically known as Cowrie collections. In the case of villages held Khas, these collections are made direct by the zamindar's staff, and, in the case of thicca villages, the amount paid by the thiccadar is based partly on agricultural rent collections in the area leased and partly on incomes from these sources, and the same is the position in the case of Mukarrari villages.

In this connection, the question of law which arises may be formulated as follows: "Is the income which the assessee derives from cowries collection whether in villages held khas, given out in thicca, or leased to Mukarraridars, taxable or not."

15. On the assumption that income from cowrie collections, which I shall describe, below, is taxable, the further question arises whether the Income-tax Officer has rightly calculated the proportion of income from Bazars, Melas and Golas representing cowrie collections and this point I shall deal with *inter alia* in an order under Sec. 33 of the Act.

16. The assessee contends that (1) under the Permanent Settlement Regulations, these sources of income are not assessable, (2) that the said items are included, or, by presumption, must be deemed to be included in the assets of the estate at the time of the Permanent Settlement, and are therefore not liable to be assessed, or (3) that these sources of income arise out of the use and occupation of the land and thus come within the definition of ground-rent. Assessee's contention that they are in the nature of ground rent will not stand examination for a moment, for, in the first place, they are realised either from the buyer or the seller or from both. Again, on reference to my order in revision in case No. 369-R of 1925-26, I find a patta there referred to granted to a certain thiccadar by the assessee in which the thiccadar is directed "to maintain the old custom known as the cowrie system which consists in taking a small fee per rupee for articles sold by non-permanent vendors". Further, "in the case of the Adapur Bazar, the thicca of which was then held by one Neazuddin Mean,

regular rates of cowrie collections in respect of different items were fixed according to which the thiccadars were to collect, and some of these rates I note below.

Import duty on kerosine oil 0-0-3 per tin.

Import duty on salt 0-0-6 per bag.

Import duty on cartload of goods 0-2-0.

Export duty on grain 0-12-0 per waggon.

Export duty on out-turn of rice from rice mill 0-12-0 per wagon.

(I do not think it can even be presumed that the export rate per railway waggon was included in the assets of the estate at the time of the Permanent Settlement). These charges are, in my view, really taxes on trade or profession. They are not in the nature of ground-rent and therefore there is no presumption whatever that they were included in the assets of the estate at the time of the Permanent Settlement and it is implied, if not specifically found in the judgment of your Lordships in the case of the *Maharajadhiraj of Darbhanga*,(1) that income from such sources is taxable.

17. I now deal with the specific arguments advanced by the assessee and based on old estate documents which in assessee's opinion prove that this source of income should not be taxed.

18. The Permanent Settlement of this estate does not appear to have followed the ordinary course. Some years before the date of the Permanent Settlement, the lands of the estate were attached owing to the recusancy of the then Raja and when Permanent Settlement was offered to the Rajah in the ordinary course on certain terms, he appears to have refused these terms. In the year 1201-F what was called a 'Dowl' settlement was given to the then Raja and this settlement appears to have been carried on indefinitely. In this connection, the assessee produced before me at the time of hearing two documents, one of the year 1201 (that is the year of the Permanent Settlement), and one of the year 1203, but it is not clear whether the settlement on which the assessee holds was or was not based on that document of 1201. The heading of the document of 1201 is as follows: "Kaifait Zapt Erazi Takhminan Kham Sewai Zamin Lakhiraj wo Paidawar Kham wo jama Malguzari Sarkar Tappajat Pergana Majhowa wo Simraon Sarkar Champaran Mozaf Suba Bihar 1201 Fasli". which may be translated as "Detailed papers of attached lands with approximate gross income excluding La-khiraj land, gross produce and amount of Government revenue in the Tappas of Parganas Majhowa and Semraon in Sarkar Champaran in the province of Bihar." In this statement, at the bottom of the list of villages in a Tappa are noted the Jalkaras with income therefrom and Government revenue, but no other form of sayer whatever is mentioned. This certainly does not support the assessee's contention.

19. The document of 1203-F is headed as follows: "Kaifait Raquba-bandi Kham Takhminan wo Paidawar Kham Tappajat Pargana Majhowa Sarkar Champaran Babat 1203 Fasli" and this heading may be translated as: "details of gross area estimated and gross produce of Tappas in Pargana Majhowa District Champaran for 1203 Fasli." Among the columns in this statement

(1) 1 I. T. C. 410.

are the following: (1) Nimak Sayer, (2) Jalkars, (3) Ferries, (4) Khiraj Eraziat Dockandaran, (5) Motaharfa.

It is argued by the assessee that the word "Motaharfa" includes cowrie collections. He quotes from Forbe's Dictionary where the word is defined as meaning "professional-tax; duties levied on certain trades and occupations." We are concerned, however with what the word means in this province and in this connection I find, in Rule 52, at page 135 of the Bihar and Orissa Cess Manual, 1922, Mutaharfa defined as "trade license fees". That rule goes on to say "The commonest case of Motaharfa is the quit rent (generally Re. 1 per loom) paid by weavers. It stands on the same footing as the ground-rent of shops in hats and fairs." Ryots who pay rent for agricultural holdings do not pay any rent for the site of their village home, while other villagers who hold agricultural land, e.g., carpenters and weavers, do pay such a ground-rent, and in my experience, this is exactly what Mutaharfa means. It has also been argued that it is to be presumed from a letter dated 24-12-1818 from the Governor-General in Council to the Board of Commissioners, Benares and Bihar, that this income was included in the jama at the time of the Permanent Settlement. What that letter states, however is not that collections from hats, bazars and melas were included in the jama of the mahal in which they were situated, but that collections from hats and bazars *which had not been resumed until after the conclusion of the Settlement* were so included, and it is clear from the nature of the cowrie collections that they must have been resumed under the various Government orders and Regulations of 1790 to 1793. The general position was that in 1793 or just before certain sayer collections were resumed and taken over by Government, as for instance, the Abkari, certain sayer collections of an objectionable nature were abolished, while the proprietors were allowed to retain others, and these latter were taken into consideration at the time of fixing the jama in the Permanent Settlement. In my view, these cowrie collections were of an objectionable nature and must therefore be presumed to have been abolished.

20. In the 2nd clause of Section VIII of Regulation I of 1793 it is noted that on the 20th July, 1791, the Governor-General in Council had directed sayer collections to be abolished, full compensation being granted to the proprietors of land for the loss of revenue sustained by them in consequence of this abolition. Again, in Section XXXV of Regulation VIII of 1793, it was directed that the assessment is to be fixed exclusive and independent of all duties, taxes and other collections known under the general denomination of sayer, an exception being the collection conferred to the proprietors and holders of ganjes, bazars and hats by the Resolution passed by the Governor-General in Council on the 11th June 1790. This section is explained in detail by clause 4 of Regulation XXVII of 1793 where the rules for the abolition of sayer passed on the 20th July 1790 are expounded. It is there noted that all sayers have been abolished with the exception of certain sayers including such collections as are conferred to the land-holders and holders of ganjes, bazars and hats by the published Resolution of the 11th June 1790, namely, rent paid for the use of land or for houses, shops or other buildings erected thereon. Cowrie collections are not rent paid for the use of land or for houses or shops and it is a fair presumption therefore that they were not included in the jama at the time of the Permanent Settlement.

21. It is therefore prayed that the points of law formulated above may be decided in favour of the Department.

K. P. Jwyaswal and *Jadubans Sahay*, for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—The assessee in this case has been assessed upon the sum which has been received in the year under assessment in respect of royalties for preparing bricks.

It appears that on the assessee's land there is a quantity of earth which is suitable for brick-making and licenses are granted to brick-makers to erect brick kilns upon the land in question and to take away brick earth and use it for the making of bricks. The method by which the assessee receives remuneration in respect of the licenses which are granted is that a definite rent of Rs. 10 a katha is charged for the land upon which the brick kilns stand and further more for earth from one kind of land the licensee has to pay Rs. 10 per specified measure and he has to pay Rs. 5 per specified measure in respect of the brick earth which is removed from another kind of land. In consideration of making this payment, he is entitled to remove brick earth from either of the two kinds of land, to erect his brick kilns, to burn his bricks, and to take them away. The licensor also grants licenses to persons who desire to remove, what are termed, concretes from the land, (these, we are told, are merely in the nature of kankar for road-making) and for the privilege of going upon the land and removing the concrete where it may be found. The licensee has to pay a royalty of Rs. 1-8-0 for every 100 cubic feet of kankar which he may remove.

It is contended by the licensee that bargains of this nature are in effect a capital sale of the brick earth or kankar as the case may be and that being in the nature of a capital sale income-tax is not assessable upon it inasmuch as the payments are not in the nature of income. In my opinion that view is not well founded. An argument has been addressed to us of this character. It is said that minerals and in particular coal are in England under the English Income-tax Act the subject of special enactment and that royalties which are received by a coal owner are taxable by reason of that special enactment, and our attention was drawn to a statement by Lord Halsbury in the case of *The Secretary of State in Council of India* v. *Sir Andrew Scoble*(1). His Lordship said: "My Lords, as I have already said, I do not think it is a matter on which one can dogmatize very clearly. Where you are dealing with income-tax upon a rent derived from coal, you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent. The income-tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines, and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation, and looking at the circumstances here and the word 'annuity' used in the Acts, I do not think that this case comes within the meaning which (using the Income-tax Acts themselves as the expositors of the meaning of the word) is intended by the word 'annuity', and that is the only word that can be relied upon here as justifying what would be to my mind a taxation of capital".

That part of the passage which relates to the taxation of rent derived from coal together with the contention that coal is as far as income is concerned the subject of special legislation in England is what is relied upon by the assesee. But an examination of the English Income-tax Act shows that the only justification for saying that coal is the subject of special legislation is that coal is mentioned in that part of the schedule to the Act which deals with the special method of dealing with certain classes of income derived from land and it is not a specific enactment that coal rents are to be specially taxable. And when Lord Halsbury dealt with income-tax upon the rent derived from coal he was not in that passage dealing with income derived from coal as a matter of special legislation.

(1) 4 Tax Cas. 618 ; (1903) A. C. 299.

Another case which was relied upon was the case of *Roberts* v. *Lord Belhaven's Executors*(1) which was decided in Scotland. That case dealt with the following circumstances. Lord Belhaven's estate had upon it large dumps of coal refuse and Lord Belhaven entered into an agreement with certain contractors to remove the whole of these dumps from his land; the removal was to be effected within a period of 3½ months and the contractors were to have the right of dealing with the waste in any way they might think fit and were to pay to him the price of 7 shillings 6 pence a ton. It was held, dealing with the matter on the basis of the agreement, that a capital sale could not be considered as income and that the special circumstances constituted in fact a capital sale. The circumstances relied upon were that the contractor had to purchase quite a definite heap of material and that he had to remove it within a certain definite time; it was in no sense a contract that the contractor should come upon the land and use it in any particular manner, or to pay royalty in respect of his license to come on the land and dig it at a certain specified rent; it was the sale of a definite heap of material for a definite price at so much a ton.

In the case that we have to decide, however, the facts are entirely different. The licensee, if the ordinary business of brick-making is followed, has the right to come upon the land to erect his brick kilns, to make bricks there, and to take all the materials that he wants for the making of his bricks from his land and in respect of that license to pay rent which is to be calculated at a specific rate which bears relation to the extent of his user of the license. If the brick-maker carries on his business until all the earth is exhausted, the land will still remain in the ownership of the licensor, possibly diminished in value, possibly unaffected in value and possibly even increased in value according to the special circumstances which may prevail at the termination of the period and it is in no sense a capital sale of the land itself.

In the course of the argument I put to Mr. Jayaswal a question as to whether there would be any difference if the brick earth was found not lying upon the surface layer of the soil but found at a depth of 50 feet under the soil, and it appeared that he had some difficulty in answering that question, because it is clear that if the earth had lain right underneath the soil he could not have used the argument that it was a sale of the soil itself.

This case, to my mind, is analogous to cases of royalties on quarries and royalties on coal in both of which cases tax has always been levied under the Income-tax Act in this country.

The question which has been put to us is—"Is the income of the assessee from the manufacture of bricks assessable to income-tax, or on the other hand, is it non-assessable as being of a casual and non-recurring nature, or, in the alternative as being income arising from the use and occupation of land and therefore agricultural income."

It is conceded that the question of it being agricultural income does not arise having regard to recent decisions of the Privy Council. It is certainly not of a casual and non-recurring nature because it is the ordinary practice for persons, who own brick-fields, to charge certain sums which, however they may be measured, are paid quarterly or annually or monthly and this income cannot be called casual because it is part of the well recognised methods of exploiting brick-fields to let them out on leases of this character; and, as I have said, it cannot be considered as in the nature of a capital sale of the assets of the assessee.

(1) 9 Tax Cas. 506.

For these reasons I would answer the question put to us by stating that the income of the assessee from the manufacture of bricks is assessable to income-tax.

There are other questions which are raised by the Commissioner of Income-tax in his letter of reference but as to these they are governed by the recent decision of the Privy Council in *Raja Probat Chandra Barua* v. *King Emperor*(1), and our answer to those questions in regard to this class of recoveries should be in the affirmative.

The opposite party is entitled to his costs which we assess at Rs. 50.

DHAVLE, J.:—I agree.

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(392) IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Horace Owen Compton Beasley, Kt., Chief Justice, Mr. Justice Sundaram Chetty and Mr. Justice Pakenham Walsh.

(29th July, 1930)

P. L. S. L. P. L. Firm .. *Assessees.*

v.

The Commissioner of Income-tax, Madras .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), *Secs.* 4 (2) *and* (3) (*ii*)—*Money-lending business in British India and Ipoh—Allotment of Ipoh outstandings at partition—Collection of outstandings entered in separate accounts at Ipoh—Sums credited in Ipoh account for Temple Tiruppani—Remittances into British India entered as from collections and temple funds—Assessment as remittances of profits—Trust, if created.*

The assessees, carrying on money-lending business in British India and at Ipoh (F. M. S.), in 1921 *opened in Ipoh separate sets of accounts for their share of the outstandings in the family business allotted to them at a partition and for the business thenceforth done under a new vilasam. The outstandings realised were shown in the first set of accounts as collections from debtors and in the second set as moneys borrowed from the first and utilised in the business. In April* 1925 *in the third set of accounts opened by the new agent taking over the assets and liabilities of the new vilasam a sum of Rs.* 25,000 *was credited in a folio headed 'Alangudi A. P. A. Tiruppani'', the said sum being debited successively against the second set of accounts, the first set and finally against the assessees.*

On an assessment to income-tax in 1926-27 *on two sums of Rs.* 24,000 *and Rs.* 25,000 *remitted from Ipoh into British India in* 1925-26 *the assessees contended that the remittance of the first sum was by them as trustees of moneys already given away to the temple before remittance and that the second sum being debited in the first set of accounts as from collections of the outstandings of the old concern were remittances of capital. The Income-tax authorities in*

(1) 4 I. T. C. 487

disallowing the contentions held that any dedication to temple, if proved at all, was a revocable one and that the entries in the accounts were not proof of the real character and origin of the second sum remitted which must be presumed to be from profits of the period prescribed in Sec. 4 (2) of the Income-tax Act.

HELD, (1) *that on the facts of the case the intention of the dedicators to utilise the money for the temple having been established, there was a valid dedication which could not be revoked and that the sum of Rs.* 24,000 *remitted and utilised for temple purposes was not assessable;*

(2) *that the sum of Rs.* 25,000 *was a remittance out of profits of the Ipoh business assessable to income-tax under Sec.* 4 (2) *of the Act.*

Case [O. P. No. 167 of 1928], stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras in compliance with the order of the High Court, dated the 10th October 1929.

CASE.

In accordance with the High Court's order quoted above, I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under section 66 (3).

2. The petitioners who constitute a registered firm, carrying on business at Devakottai in the Ramnad District, at Ipoh in the Federated Malay States, and at various other places, object to the inclusion in the assessment made on them for the year, 1926-27, of two sums totalling Rs. 49,000 being the profits of their business in Ipoh remitted to them in British India. The facts relating to these remittances are as follows:—

There was a money lending business carried on in Ipoh under the vilasam "P. L. S" which belonged to a family called "P. L. S". In the year 1921, the family broke up into two branches and each branch started a business of its own at Ipoh. The petitioners represent one of these two branches and the business started by them was styled "P. L. S. L. P. L". The debts due to the business carried on under the vilasam "P. L. S." from its various debtors were divided into two halves and each of the two branches took one half. The petitioners opened separate sets of accounts, (1) for the outstandings thus taken over and (2) for the business done under the vilasam "P. L. S. L. P. L." The collection of these outstandings was looked after by the agent who looked after the business started by the petitioners. Any sums realised from these debtors were, as and when collected, utilised in the money lending business styled "P. L. S. L. P. L". The sums were exhibited in the first set of accounts as collections from the debtors and in the second set of accounts as moneys borrowed from the first.

Rs. 25,000. In the year of account, 1925-26, the petitioners received a remittance of Rs. 25,000 from their Ipoh business into British India. This remittance was exhibited in the second set of accounts referred to above as money transferred to the first set and in the first set as money remitted to the assessees.

Rs. 24,000. In about March, 1925, a new agent arrived in Ipoh to take over the business at Ipoh. He opened new accounts for his agency and transferred to these accounts the assets and liabilities of the business "P. L. S. L. P. L" as shown in the second set of accounts mentioned above. On 4th April, 1925, the agent, under the instructions of the petitioners, opened in the third set of accounts a folio headed "Alangudi A. P. A Tiruppani". I append translations of an agreement entered into between the partners in February, 1925, regarding the

execution of the Tiruppani (works in the Temple) (Exhibit A*) and of two letters dated 1st March, 1925 and 4th April, 1925, written by the petitioners to their agent at Ipoh directing the transfer of funds to the folio referred to above (Exhibits B* and C*). The agent credited this folio with Rs. 25,000 and raised a corresponding debit against the second set of accounts, which in turn passed on the debit to the first set of accounts, which in its turn passed it on to the assessees. In other words, a sum of Rs. 25,000 was exhibited in the first set of accounts as having been paid to the petitioners and in the third set of accounts as having been received from them on behalf of the account headed "Alangudi A. P. A. Tiruppani". Out of this amount of Rs. 25,000, and by debit to this account, sums amounting to Rs. 24,000 were remitted to the petitioners during the year of account.

3. The petitioners claimed before the Income-tax Officer that because these amounts, (i.e., the first mentioned sum of Rs. 25,000, and the second mentioned sum of Rs. 25,000 out of which the Rs. 24,000 now in question was received in British India) were debited to them in the first set of accounts it should be assumed that the remittance of Rs 25,000 and Rs. 24,000 came from the assets taken over from the old "P.L.S." concern and that consequently they were remittances of capital. The Income-tax Officer declined to accept the contention and taxed the amount; and, on appeal, the Assistant Commissioner agreed with him. In regard to the second sum, viz., the Rs. 24,000 the petitioners claimed before the Assistant Commissioner that the sum of Rs. 25,000 out of which these remittances came had been given away by them to the temple before the remittance to British India and that in making the remittance they merely acted as trustees on behalf of the temple. The only evidence offered in support of this claim was the initial credit entry of Rs. 25,000 in the folio headed "Alangudi A. P. A. Tiruppani". The Assistant Commissioner held that this evidence did not amount to proof of a dedication or irrevocable trust in favour of the temple.

4. The petitioners thereupon asked me to refer to the High Court various questions of law said to arise out of the Assistant Commissioner's order but I declined to refer them as I was of opinion that no question of law arose. The High Court has now directed me by its order dated the 10th October, 1929, to state a case and refer the following question: "Whether when an assessee carrying on business in foreign places and receiving any remittance from there into British India in any year produces his accounts which show that the remittance was not received from the profits of the period prescribed in section 4 (2) of the Act but that it comes from other sources at his command, will it be lawful to the Income-tax Officer to ignore this evidence and act on the presumption that, when there is a profit in the foreign business any remittance that comes from that business should be regarded as having come from the profits without reference to the question as to the source to which the remittance was actually appropriated, where such appropriation is not found to be made for the purpose of not paying the income-tax payable."

5. My opinion regarding this question is that it assumes a set of facts quite different from those in the case. The accounts produced do not show that the remittance was not received from the profits of the period prescribed in section 4 (2) of the Act, or that it came from other sources at the petitioner's command. The only ground on which it is claimed that the accounts show this is that the remittance has been exhibited as a debit to the petitioners in the first set of accounts referred to above. It is sufficient to remark in reply that those accounts are not the accounts of a separate business. The Income-tax Officer did not ignore the evidence. He considered it and came to a finding. As regards the closing words of the question it is true that there has been no enquiry as to

* Not printed.

the motive that led the petitioners to make the entries in the accounts on which he relies; but it was held that the entries, whatever motive may have prompted them, were not proof of the real character and origin of the money remitted.

6. I have also been directed, in respect of the amount of Rs. 25,000 credited to the account headed "Alangudi A. P. A. Tiruppani", to give a finding as to whether there has been any dedication in fact and whether the entries were made with the object of keeping the property out of the properties liable to income-tax. As pointed out in paragraph 2 above what happened in this case was merely that the petitioners instructed their Ipoh agent to transfer a sum of Rs. 25,000 from their personal account to an account headed "Alangudi A. P. A. Tiruppani" and the agent made the necessary entries in the books. The fact of the transfer perhaps indicates that the petitioners proposed to spend that amount on the work in question but does not prove anything more. In particular there is no indication that any one knew of the existence of this Fund other than the persons who reserved the Fund, or that the petitioners divested themselves of control over the Fund. There was nothing to prevent them at any time, if they chose, from diverting the Fund to other purposes or from resuming it altogether. I therefore consider that if there was any dedication at all it was a revocable one.

The Advocate-General and *K. S. Rajagopalachari,* for the Assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

THE CHIEF JUSTICE:—On the last occasion when this matter came before a Full Bench asking for an order upon the Income-tax Commissioner to refer a question for the decision of the High Court, a question was framed by the High Court on the argument put before it which, it appears to me, answers itself in the negative. But a great deal of what appears in that question seems to have been founded on a probable misconception of what the real facts in the case are.

Put quite shortly, the facts are these. The assessee who has his headquarters in British India was carrying on a money-lending business together with the other members of his family in Ipoh in the Federated Malay States. In 1921 the family broke up and when the family broke up the assets of the joint family business were distributed and the debts due to the family business which was carried on under the vilasam of "P.L.S." were transferred to the new business started which according to the Income-tax Commissioner was a new agency but which according to the assessee was a new firm. The amount taken from the funds of the old business called the Oor business was Rs. 1,70,000 odd. Those were outstandings and of course in a money-lending business outstandings represent both principal and the interest on that principal. The course of dealings appears to have been that when outstandings were collected by the Oor Firm, they were transferred to the so-called new firm or new agency and taken into the books of that new firm or agency. During the year of account Rs. 49,000 was remitted from Ipoh to British India and the Commissioner of Income-tax and before him the Income-tax Officer have held that the whole of that remittance is a remittance out of profits earned outside British India during the year of account and the statutory three years period and as such assessable to income-tax in British India. This amount of Rs. 49,000 according to the assessee, is split up as follows:—Rs. 24,000 dedicated to a temple for its repairs and so on, Rs. 16,000 interest about which I shall have to say something more later on and Rs. 9,000 capital.

The assessee's contention is that Rs. 24,000 was agreed to be dedicated to a temple in South India, that the dedication of that sum took place in Ipoh, that it was in that shape that the money was remitted to British India and that it is therefore not liable to assessment. As regards the Rs. 16,000 interest, what the assessee says is that that sum is interest earned either on the total outstandings of the Oor firm from constituents other than the so called new firm, or is the interest paid by the new firm to the Oor firm in respect of money lent to it by the Oor firm, or represents the profits earned by the new firm from its own constituents. The accounts are by no means plain and it does not seem possible to ascertain what the real contention of the assessee is with regard to the source of that money. But it is for the assessee to show that remittances when made are not out of profits. With regard to the Rs. 9,000 that is said to be a return by the new firm to the Oor firm of money lent to it and not profits in any shape or form earned by the Oor firm.

Dealing first with the Rs. 24,000, the Income-tax Commissioner has held that there may possibly have been a dedication to the temple but that as it was a private arrangement and nobody outside the dedicators knew of it, it was at the most a revocable one. Of course that position is one which can never arise in law and once a dedication has been made it cannot be revoked. I think that probably what the Income-tax Commissioner means when he says it was a revocable dedication is that there may have been an intention to dedicate but that as it was not communicated to anybody outside the family, it was a sort of tentative dedication which at any time could be set aside as and when the money supposedly dedicated was required by the firm or the family. But when the case first came before the Bench, the Commissioner had not the documents before him which are now before the Court; and they show that in the Ipoh books a sum of Rs. 25,000 was actually set aside for the purposes of this temple and not only that but that monthly remittances of Rs. 2,000 amounting in all to Rs. 24,000 were made to British India and that when those remittances arrived in British India, they were utilised for the purposes of the temple. There are also certain letters exhibited, which clearly show that the intention of the dedicators was to utilise the money for the express purposes of the temple. Had this information and evidence been before the Income-tax Officer, I feel sure that he would have held that the presumption that the remittances were out of profits had been displaced overwhelmingly by the assessee. The view that I and my learned brothers take of this is that certainly the sum of Rs. 24,000 must be deducted from this assessment.

With regard to the remaining items making up Rs. 25,000, the position is this that obviously during the year of account and during the statutory three years there was collected by the Oor firm a sum in the shape of interest and therefore profits far in excess of the Rs. 25,000 remitted by the Oor firm to British India. A statement has been put in showing the collections in 1925 and during four months in 1926 and we find from that that a sum of 82,000 (Dollars) was collected during that short period. Obviously of that amount realised a considerable sum would represent profits but of course we have not got before us any of the realisations in 1924-25. It seems clear to us that the Oor firm must have collected profits far in excess of the Rs. 25,000 remitted to British India and that being so, the inference is that the Rs. 25,000 was a remittance out of profits and that inference has got to be displaced by the assessee.

What really took place was this. The Oor firm collected profits of more than Rs. 25,000 and part of those profits, namely, Rs. 25,000 it placed to the credit of the so-called new firm, and then the assessee got back the Rs. 25,000 split up in the amount as Rs. 16,000 interest and Rs. 9,000 capital. As a matter

of fact what really happened was that out of the profits the assessee had collected he paid Rs. 25,000 to himself in another firm and got back that Rs. 25,000 from himself in the other firm to himself in the Oor firm. He credited the new firm with the profits and he got all those profits back and he remitted those profits to British India. Under these circumstances it must follow that the whole of the Rs. 25,000 remitted from Ipoh to British India was a remittance out of profits and is liable to be assessed to income-tax. It is rather difficult, of course, to answer the question put to us in its present form but I think that what I have stated quite sufficiently answers the question. Having regard to the fact that the assessee has partly succeeded on this reference, there will be no order as to costs. The deposit of Rs. 100 made by the assessee will be refunded.

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(893) IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Horace Owen Compton Beasley, Kt., Chief Justice, Mr. Justice Sundaram Chetty and Mr. Justice Pakenham Walsh.

(29th July, 1930).

P. L. S. K. R. Firm .. *Assessees.*

v.

The Commissioner of Income-tax, Madras .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 4 (2)—Money-lending business in British India and Ipoh—Allotment of Ipoh outstandings at partition—Outstandings collection entered under separate ledger heading—Remittances into British India debited to outstandings account—Assessment as remittances of profits.

The assessees, carrying on money-lending business in British India and at Ipoh in 1921, opened in Ipoh separate sets of accounts for their share of the outstandings in the family business allotted to them at a partition and for the business thenceforth done under a new vilasam. The outstandings realised were shown in the first set of accounts as collections from debtors and in the second set as moneys borrowed from the first and utilised in the business. In April 1925 the first set of accounts was discontinued, the outstandings entered therein being transferred to the account opened by the new agent by opening a folio therein headed "old account" and other folios for the various debtors.

On an assessment of a remittance of Rs. 25,000 in 1926-1927 from the Ipoh business into British India, the assessees contended that the remittance being debited in their Ipoh accounts to the account headed "old account" was capital receipts of the assets taken over and not profits of the business.

HELD, that on the facts of the case the Income-tax Officer was justified in infering that the remittance was out of profits of the Ipoh business assessable under Sec. 4 (2) of the Income-tax Act.

Case [O. P. No. 249 of 1928], stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras in compliance with the order of the High Court dated the 10th October, 1929.

CASE.

1. In accordance with the High Court's order, I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under section 66 (3).

2. The petitioners, who constitute a registered firm, carrying on business at Devakottai in the Ramnad District, at Ipoh in the Federated Malay States and at various other places, object to the inclusion in the assessment made on them for the year, 1927-28 of a sum of Rs. 25,000, being the profits of their business in Ipoh remitted to them in British India. The facts relating to this remittance are as follows:—

There was a money-lending business carried on in Ipoh under the vilasam "P.L.S." which belonged to a family called "P.L.S." In the year, 1921, the family broke up into two branches and each branch started a business of its own at Ipoh. The petitioners represent one of these two branches and the business started by them was styled "P.L.S.K.R." The debts due to the business carried on under the vilasam "P.L.S." from its various debtors were divided into two halves and each of the two branches took one half. The petitioners opened separate sets of accounts (1) for the outstandings thus taken over and (2) for the business done under the vilasam "P.L.S.K.R." The collection of these outstandings was looked after by the agent who looked after the business started by the petitioners. Any sums realised from these debtors were, as and when collected, utilized in the money lending business styled "P.L.S.K.R." Up to the end of the year 1924-25 such sums were exhibited in the first set of accounts as collections from the debtors and in the second set of accounts as moneys borrowed from the first. In the beginning of the year, 1925-26, i.e., of the year preceding the year of account now in question the first set of accounts was discontinued. A new agent arrived to take over the business at Ipoh. He opened new accounts for his agency and transferred to these accounts the assets and liabilities of the business "P.L.S.K.R." as shown in the second set of accounts mentioned above. He also transferred to these same accounts such of the debts appearing in the first set of accounts as were still outstanding on that date. The transfer was effected by opening a folio headed "old account—K.R.'s account" (i.e., the first set of accounts referred to above) entering a credit of $1,08,875 in that folio (this representing the total of the assets in that set of books) opening ledger folios for the various debtors, etc., from whom moneys were still due and debiting those folios with the amounts due. From that time onwards these outstandings have been treated in the books (the third set of accounts) as on the same footing as the other loans, i.e., the loans advanced by the P. L. S. K. R. firm itself. The monies collected, whether from the former class of debtors or from the latter, go into the same till and are utilized in the conduct of the money-lending business. In the year of account 1926-27 the assessees received a remittance of Rs. 25,000 from their Ipoh business into British India. This remittance was debited in the Ipoh books to the account headed "old account—K. R.'s account" referred to above.

3. The petitioners claimed that because the amount was so debited it should be assumed that the remittance came from the assets taken over from the old 'P. L. S.' concern and that consequently it was a remittance of capital. The Income-tax Officer declined to accept the contention and taxed the amount; and, on appeal, the Assistant Commissioner agreed with him. The petitioner asked me to refer to the High Court various questions of law said to arise out of the Assistant Commissioner's order but I declined to refer them

as I was of opinion that no question of law arose. The High Court has now directed me by its order dated 10th October 1929 to state a case and to refer the following question:

"Whether when an assessee carrying on business in foreign places and receiving any remittance from there into British India in any year produces his accounts which show that the remittance was not received from the profits of the period prescribed in section 4 (2) of the Act but that it comes from other sources at his command, will it be lawful to the Income-tax Officer to ignore this evidence and act on the presumption that, when there is profit in a foreign business, any remittance that comes from that business should be regarded as having come from the profits without reference to the question as to the source to which the remittance was actually appropriated, where such appropriation is not found to be made for the purpose of not paying the income-tax payable."

4. My opinion regarding this question is that it assumes a set of facts quite different from those in the case. The accounts produced do not show that the remittance was not received from the profits of the period prescribed in section 4 (2) of the Act, or that it came from other sources at the petitioner's command. The Income-tax Officer did not ignore the evidence. He considered it and came to a finding. As regards the closing words of the question, it is true that there has been no enquiry as to the motive that led the petitioner to make the entries in the accounts on which he relies; but it was held that the entries, whatever motive may have prompted them, were not proof of the real character and origin of the money remitted.

The Advocate-General and *K. S. Rajagopalachari*, for the Assessees.

M Patanjali Sastri, for the Crown.

JUDGMENT.

THE CHIEF JUSTICE:—The answer given by us to the reference in O. P. No. 167 of 1928 concludes this matter. There is only one difference in the facts between the two cases and that difference really rather weakens this assessee's case than strengthens it. In this case the whole of the outstandings were transferred to the new account instead of being kept with the old firm. The assessee made collections of these outstandings from time to time and remitted a sum of Rs. 25,000 to British India, and that sum of Rs. 25,000 the Income-tax Officer has assessed to income-tax. The facts are that different accounts were kept by the so-called new firm—really it was exactly the same thing as the old one—that in one account were shown the collections made from the debtors of the old firm in respect of the old outstandings and in another account were shown the collections made in respect of the new business. These collections from all the sources, of course, went into the common fund although shown under different headings in the ledgers and necessarily so because the new business was collecting the old outstandings and the old debts could not possibly be mixed up with the new ones.

The contention put forward before us here is that because there were these old outstandings of which collections were made, because these collections were separately kept and because also there are entries in the account in respect of those collections and of this remittance of Rs. 25,000, the inference that the remittance was out of profits (there being more than sufficient profits to cover the remittance) has been displaced by the assessee. With that contention we entirely disagree. As before stated, the fact that the two accounts

were kept separately has no significance whatever for the reasons already given and the fact that the agent at Ipoh chose to enter this remittance against the collections in respect of the old outstandings rather than new profits cannot conclude the matter, particularly when we are told that the reason for doing this is that as between the agent and the principal the agent received his bonus upon the profits of the new business and therefore to debit these collections against the profits of the new business would be to diminish considerably his bonus; so that, as regards the agent himself, he had every reason for making this debit entry against the old outstandings but as between the assessee and the Income-tax authorities that arrangement cannot possibly affect or in any way conclude the matter.

There is this further circumstance to be taken into consideration and that is that even the collections in respect of the old outstandings show that a sum far in excess of the amount remitted was collected. There is apparently no distinction drawn in the account between the collections in respect of principal or in respect of interest, there being no attempt whatever to divide them. The inference being that a person does not remit except out of profits, it is quite safe for us to say that this remittance was a remittance out of profits. That being so, we are quite satisfied that it being entirely a question of fact, the Income-tax Officer did not misdirect himself in any way and was quite justified in coming to the conclusion that the inference or the presumption was that this remittance of Rs. 25,000 was out of profits of the Ipoh business. Here again we may say that it is impossible to answer the question framed except in the light of the facts as we now know them and what we have stated must be the answer to the question referred to us. The assessee will pay the costs of the Income-tax Commissioner which we fix at Rs. 150.

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(394) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(31st July, 1930).

Ram Chandra Kashi Nath .. *Assessee.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act, (XI of 1922), Secs. 34, 22 (2) and 23 (4)—Business in Arrah and Calcutta—Escaping of Calcutta income—Notice under Sec. 34 for return of Calcutta income—Return of income as lump sum from Arrah and Calcutta—If sufficient compliance of notice—Assessment for non-mission of return.

The assessee carrying on business at Arrah and Calcutta, served with a notice under Sec. 34 of the Income-tax Act, requiring him to submit a return of income from the Calcutta branch alleged to have escaped assessment in the previous year, sent back the return form blank without any signature or verification but accompanied by a separate petition stating that in the previous year he had already filed a return of income showing a single sum as income from Arrah and Calcutta branches together. On an assessment under Sec. 23 (4) for failure to submit a return,

HELD, that there was no compliance with the requirements of Sec. 34 read with Sec. 22 (2) of the Act, the return in the previous year not distinguishing the Calcutta branch income from Arrah branch income but lumping both together.

Case [Miscellaneous Judicial Case No. 25 of 1929], stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Bihar and Orissa, in compliance with the order of the High Court.

CASE.

At the direction of the Hon'ble Court, I state below and refer a case under Sec. 66 (3) of the Indian Income-tax Act (XI—22).

2. The facts are as follows: Ramchandra Kashinath of Chowk, Arrah, a Hindu undivided family, hereinafter called the assessees, are engaged in business in cloth, gunnies, etc., both in Arrah and Calcutta. They are assessees of the Income-tax Officer of the Patna-Shahabad Circle. In the years prior to the year of assessment 1926-27, they were assessed on the income from their Arrah business only, and in none of those years did they file return of income. In the year of assessment 1926-27 which is the year of assessment in the present case, they filed a return of income, purporting to include in a lump sum income accruing from both Calcutta and Arrah. From the record it would appear that the Income-tax Officer failed to notice that return had been submitted purporting to be in respect of Calcutta as well as in the respect of Arrah income. On the 13th July 1926 the Income-tax Officer issued a notice under section 23 (2) directing the assessees to produce the evidence on which they relied in support of their return, and also a notice under section 22 (4) to produce accounts of the last two years. The date of hearing was fixed for the 6th August. The assessees sent a telegram asking for a fortnight's time on the ground of the serious illness of the son of the head of the family. The prayer was allowed, and the assessees informed that their case had been adjourned to the 26th August.

On the 11th August the Income-tax Officer, noting on the order-sheet that on enquiry it appeared that the assessees owned a branch business in Calcutta, requisitioned an Income-tax Officer in Calcutta to report the income of the branch, if any. On the 26th August the assessees sent a telegram praying for a further month's time to produce their evidence on the ground of the illness of the head of the family. The prayer was allowed, and the case was adjourned to the 30th September. The assessees were informed by registered post of the date fixed, and warned that they were expected to appear without fail on that date. On the 30th September a telegram was received that the head of the family was seriously ill and praying for one month's extension. The Income-tax Officer rejected the prayer and made the assessment under section 23 (4). There can be no doubt that he was amply justified in disallowing further time. Assessment was made on the income from the Arrah business only, since Calcutta had reported that there were no premises at the address furnished, and the Income-tax Officer was apparently not sure that any Calcutta income would be assessable. He noted on the order sheet of the case under the same date that he would make enquiries in regard to the address of the Calcutta business. Under date 27th November, there is a note on the order sheet that enquiry at Arrah had discovered the address of the assessees in Calcutta to be 20, Darmahata Street, and an order to requisition the Income-tax Officer District I, (I), Calcutta, to make an enquiry and report assessable income of the branch, if any, was passed. The report of the Income-tax Officer, Calcutta was not received until the 15th March 1927. The close of the financial year

was then approaching. The Income-tax Officer, therefore, noted on the order sheet that steps under section 34 would be taken in the ensuing year along with that year's case. Presumably he was considering the convenience of the assessees, so that both assessments might be made at the same time.

On the 16th May 1927, the Income-tax Officer, issued a notice upon the assessees under section 34 requiring them to submit a return of their income from the Calcutta branch, which income had escaped in the preceding year. The form of return was returned blank by the assessees, without any signature on it or verification but with a separate petition to the effect that they did not understand why they were required again to file a return of their Calcutta income under section 34, when they had already submitted a return of their total income arising both in Calcutta and in Arrah. Thereupon the Income-tax Officer issued them a post card requesting them to appear before him, so that the matter might be explained to them personally. This post card which issued on the 23rd September 1927, was not a notice issued under the Act, but a warning conveyed *ex-gratia*. The assessee was not entitled to any notice under the law, having committed default in not submitting a return. On the 6th February 1928, no appearance having been put in on behalf of the assessees since 23rd September 1927, and nothing further having been heard from them, assessment was made under section 34 read with section 23 (4) on the escaped Calcutta income. The basis of the assessment was the report submitted by the Income-tax Officer in Calcutta. Subsequently, the assessees filed a petition under section 27 asking that the assessment might be re-opened. In that petition they submitted that they had been unable to comply with the requisition of the Income-tax Officer to appear, so that the matter might be explained to them, because the head of the family was alone in the shop, and there was no one else to look after the business. This was a thin excuse. It is perfectly plain that the assessees deliberately defaulted to give the Income-tax Officer an opportunity of explaining the position, since between the dates 23rd September and 6th February they could easily have briefed a pleader to represent them or sent some member of the family or a Gomashtha to obtain instructions. The petition under section 27 was rejected by the Income-tax Officer, whose rejection was upheld by the Assistant Commissioner in appeal. Whereupon the assessees petitioned the Commissioner of Income-tax to state a case to the Hon'ble High Court under section 66 (2) on the following question of law: "Whether an assessee called upon to file a fresh income return for a particular year under section 34 can be held to have complied with the requirements if he refers to his old return filed earlier and is then entitled to a notice under section 23 (2) before assessment under section 34 can be made"? My predecessor refused to state a case.

3. In their application under section 66 (3) to the Hon'ble Court, the assessees have again stated the identical question of law. In my opinion, however, this question does not arise in the case, as misassuming the facts. The assessees did not, in point of fact, "refer to their old return". What they did was to return the form of return completely blank, at the same time sending a separate petition stating that they had already submitted a return of their total income arising both in Calcutta and in Arrah, and that they did not understand why they were again being asked to file a return of their Calcutta income under section 34. By no stretch of meaning can the action or the language of the assessees in this connection be circumscribed within the connotation of the vague and indeterminate term "refer".

4. There can be no doubt that the Calcutta branch earned an income assessable in the year in question. There can also be no doubt that this income had escaped assessment. The question propounded by the assessees as given

above admits both these facts. Again there can be no doubt that the Income-tax Officer was within his powers to issue a notice under section 34 requisitioning a return of the escaped Calcutta income. This is also admitted in the question propounded by the assessees. The following question of law therefore, in my opinion, arises in this case: On the facts set out in paragraph 2 of this statement, can the assessees be held to have complied with the requirements of section 34, read with sub-section 2 of section 22, relating to the submission of return?

5. My opinion on this question is as follows. Section 34 empowers an Income-tax Officer to issue a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22. The latter sub-section directs issue of a notice requiring an assessee to furnish a return in the prescribed form and verified in the prescribed manner, setting forth, along with such particulars as may be provided for in the notice, his income during the previous year.

The notice under section 34 issued in this case conformed to the terms of section 22 (2), and required the assessees to furnish a return in the prescribed form and verified in the prescribed manner, setting forth their income from the Calcutta branch which had escaped assessment. Actual submission of return was, therefore, imperatively required according to the terms of section 22 (2). But the assessees submitted no return at all. They sent back the form of return *completely blank* without any entries of any sort, without verification and without a signature, at the same time putting in a separate petition to the effect that they had already submitted a return of their total income arising both in Calcutta and in Arrah, and did not understand why they were again being asked to file a return of their Calcutta income under section 34. Such action, in my respectful opinion, was not in any possible sense compliance with the requirements of section 22 (2) to submit a duly verified return.

6. In default of return, the Income-tax Officer had no alternative open to him under the provisions of the Act but to assess under section 23 (4). Nor can it be said that he dealt peremptorily with the assessees. On the contrary, he asked them to appear for explanation. His offer remained open from the 23rd September to the 6th February, but was not availed of during that long period on the entirely flimsy and unsubstantial ground that the business could not be left.

7. It is, therefore, respectfully submitted to the Hon'ble Court as my opinion that the question is fit to be answered in the negative.

Biseswarnath Sahu and *Anand Prasad*, for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—The facts necessary for the decision of this case may be shortly stated.

The assessee has a business and he has a branch of that business at Arrah and a branch at Calcutta. He received notice to make a return of the Arrah branch under section 22 (2) of the Act. His return set forth a single sum of about Rs. 4,000 as being the income from his Arrah and Calcutta branches without distinguishing, however, between that part which was derived from the Calcutta branch and that part which was derived from the Arrah branch. The

Income-tax Officer later had information about the branch of the assessee's business in Calcutta and that information stated that a considerable sum was received by the assessee in respect of the Calcutta branch. Believing therefore from this information that part of the assessee's income received from the Calcutta branch had in fact escaped assessment, he served a notice upon the assessee under section 34 of the Act requiring him specifically to state the income received from the Calcutta branch. The assessee sent back the form which was sent with the notice without entering anything upon it but accompanied it with a petition under section 27, stating that he had already filed a return of his income for the year in question and that he could not understand the further requirement for information, and he referred the Officer to his original return made from Arrah.

Now it is perfectly clear that that reply together with the petition did not constitute a compliance with the notice under section 34. The notice under section 34 required a specific statement of the income of the assessee from the Calcutta branch; the return which he had already made did not distinguish the income from the Calcutta branch from that of the Arrah branch but gave them both lumped together. In those circumstances the Income-tax Officer finding that the requirements under section 34 had not been complied with proceeded to assess the assessee under section 23 (4).

The assessee objects to that procedure and has raised the point that his reply to the notice under Sec. 34 referring to his return from Arrah was a sufficient compliance with the notice; and the only point that we have to decide is whether on the facts set out can the assessee be held to have complied with the requirements of section 34 read with sub-clause (2) of section 22 relating to the submission of returns. The essential facts are as I have stated them above, and in my view they do not constitute a compliance with the requirements of section 34, and I would answer the question in the negative.

The assessee will pay Rs. 50 as costs to the opposite party.

DHAVLE, J.:—I agree.

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(395) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(31st July, 1930).

Messrs. Mohan Lal Hardeo Das .. *Assessees.**

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act, (XI of 1922), *Secs.* 66 (2), (3), 23 (4), 27 *and* 30—*Assessment under Sec.* 23 (4)—*Dismissal of application under Sec.* 27 *and appeal therefrom—Reference to High Court, Scope and limits of—Question* re *Sec.* 23 (4) *Assessment, if arguable.*

Where an application under Sec. 27 *of the Income-tax Act to re-open an assessment under Sec.* 23 (4) *for failure to produce account books called for*

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* I. L. R. 9 Pat. 172; A. I. R. (1931) Pat. 14.

under Sec. 22 (4) was dismissed by the Income-tax Officer and an appeal therefrom was rejected by the Assistant Commissioner,

HELD, that on a reference to the High Court under Sec. 66, such questions alone within the terms of Sec. 27 of the Act which could have been taken on the appeal before the Assistant Commissioner, could be raised and not questions regarding the assessment under Sec. 23 (4) not appealable under Sec. 30 (1) proviso.

Case [Miscellaneous Judicial Case No. 11 of 1929], stated under Sec. 66 (2) and (3) of the Indian Income-tax Act, (XI of 1922), by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act (XI—22) I have the honour to state the following case for the decision of the Hon'ble High Court.

2. Messrs. Mohan Lal Hardeo Das (hereinafter termed the assessees) are a Hindu Undivided Family, who carry on various kinds of business at four places in the District of Darbhanga and also at Calcutta and at Barhava in the district of Monghyr. Their principal place of business is in Darbhanga, and they are assessed by the Income-tax Officer, Darbhanga, as the Income-tax Officer having jurisdiction over the area in which their principal place of business is situated. In connection with their assessment for the year of assessment 1928-29, the Income-tax Officer, Darbhanga, served upon them a notice under section 22 (2) of the Income-tax Act to submit return of their total income from all sources for the previous year. The said notice was served on the 25th April, 1928. The Income-tax Officer had previously, on the 2nd April, issued letters to the Income-tax Officer of Monghyr and to the Income-tax Officer, District IV (3) Calcutta, requesting them to report the income of the branch businesses at Monghyr and Calcutta respectively. The return was due to be submitted on the 25th May. On that day a petition was put in on behalf of the assessees to be allowed two months' time to submit the return on the ground that their gumashta was ill and the accounts were not ready. The Income-tax Officer allowed time till the 1st July. On the 3rd July the form of return was received back from the assessees. The form was not properly filled up, but in the margin it was written that, in the year ending Kartik 15 (October) 1984, being the previous year, they had suffered a loss of about 8,000 and that the return was approximate as the account books were not adjusted. The form was signed "Mohan Lal Hardeo Das by the pen of Parmeshwar Lal".

The Income-tax Officer wrote explaining that the return did not fulfil the requirements of section 22 (2), and was, therefore, no return at all. He instructed the assessees that the verification must be signed by the authorised person, and the particulars required by Note 5 of the prescribed form of return filled in. He further warned the assessees that, in default, the return would not be considered valid. The assessees in reply forwarded a letter of authority in the name of Parmeshwar Lal. They added that the return had been filed in haste, as the account books were not ready, and asked that the same be admitted and notice under section 23 (2) be issued allowing a fortnight's time, by which date they would be ready with a profit and loss statement and with their account books. The Income-tax Officer thereupon informed them that notice under section 23 (2) could not issue unless a valid return was filled, and again gave warning that total income or total loss should be set down in the return and the particulars required by Note 5 submitted, otherwise the return would be treated as invalid. The assessees stated in reply that, "as regards the particulars to be submitted, the

return was as usual, and, moreover, there was no sufficient space in the form of return to contain the complete particulars of the firm; they added that, if they were served with a notice under Sec. 23 (2), and if forms for that purpose were sent them, they would submit a profit and loss statement. This reply was received on the 22nd August. The Income-tax Officer, on receipt, noted that the return was not valid, but ordered the case to be put up after the 4th October, in the hope that the assessees might correct the return in the course of their appearances in connection with their remanded assessment for the year 1926-27 which was pending at the time. This hope was unfulfilled, and, on the 14th October assessment was made under section 23 (4) for default of submission of return. It will be noted that the assessees had some 12 months to close their accounts and submit a valid return.

Subsequently on the 17th October, report was received from the Income-tax Officer, District IV (3), Calcutta, that the assessees had filed before him a return of their income from their Calcutta branch, but had failed to produce their Calcutta books for examination on the 5th October, being the date fixed by notice under section 23 (2), on the plea that those books had been sent to Darbhanga for final adjustment. He further intimated that the assessees had requested that their Calcutta books might be examined at Darbhanga. On the 28th February of the next year, 1929, a report was received from the Income-tax Officer of Monghyr that return had been submitted by the assessees of their income from the branch business at Barhya in that district, but that, in response to notices under sections 23 (2) and 22 (4), which issued on the 11th February, they had replied that assessment had alretdy been made by the Income-tax Officer, Darbhanga. These reports were filed by the Income-tax Officer, Darbhanga, as he had already completed the assessment.

The return submitted to the Income-tax Officer of Monghyr was defective in the very same respects as the return purported to be submitted to the Income-tax Officer of Darbhanga, but the Income-tax Officer of Monghyr accepted the same as valid.

The assessees submitted an application under section 27 in which they urged that the return submitted was valid, and the assessment under section 23 (4) illegal without issue of notice under section 23 (2). The Income-tax Officer rejected the application and refused to re-open the assessment, whereupon they appealed to the Assistant Commissioner, who upheld the order of the Income-tax Officer.

3. The assessees under section 66 (2) have required me to refer the following points of law to the Hon'ble High Court:—

(a) Whether the return filed by the assessees was an invalid return for the purpose of making an assessment under section 23 (4).

(b) Whether the return having been filed, the notices under sections 23 (2) and 22 (4) were bound to issue.

(c) Whether any assessment can be made under Sec. 23 (4) when the return has been filed, but no notice under section 23 (2) has been issued and served.

(d) Whether the return filed at the principal place of business can be a basis of assessment under section 64 Income-tax Act.

(e) Whether the Income-tax Officer of Darbhanga was justified in rejecting the return and making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta.

4. My opinions on these questions are as follows:—

Question (a), "whether the return filed by the assessee was an invalid return for the purpose of making an assessment under section 23 (4)", is not happily worded, and, in fact, contains two questions in one; namely, (1) whether the return was invalid, and (2) whether the assessment under section 23 (4) was justified. The latter question is again stated in question (e), and I prefer to deal with it under question (e). Question (a) is, therefore, restated for submission as follows: "Was the return, which was filed, a return which satisfied the requirements of section 22 (2) and the rules made thereunder". My opinion on this question is as follows: Section 22 (2) requires a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) total income during the previous year. Section 59 of the Act gives the Central Board of Revenue authority to make rules for carrying out the purposes of the Act. In exercise of that power the Central Board of Revenue have prescribed the form of return in Rule 19, Part II, Income-tax, Manual, Volume 1. The form requires Note 5 to be filled up. The assessees made no entries against Note 5. Moreover, it is obvious that an accurate statement of total income is required, not a mere guess, such as was submitted by the assessees. Section 52 of the Act declares a false statement in a verification mentioned in section 22 to be an offence under the Indian Penal Code. If assessees are allowed to submit guesses at their income by way of return, the object of section 52 will be made of no effect. Therefore the form filled up and submitted by the assessees, which purported to be a return was, not merely an incorrect or incomplete return, but a mere nullity and not a return at all, and, in my opinion, the question should be answered in the negative.

Question (b), "whether the return having been filed, the notices under sections 23 (2) and 22 (4) were bound to issue", does not arise, if my opinion in regard to question (a) is found to be correct. Otherwise, the answer to the question is that issue of notice under section 23 (2) was obligatory upon, but issue of notice under section 22 (4) was at the discretion of the Income-tax Officer.

Similarly question (c), "whether any assessment can be made under section 23 (4) when the return has been filed, but no notice under section 23 (2) has been issued and served", does not arise, if my opinion in regard to question (a) is found correct. Otherwise, the question is due to be answered in the negative.

Question (d), "whether the return filed at the principal place of business can be a basis of assessment under section 64 of the Act", in the form stated, does not arise, since the assessment was not "based" on a return, but was made under section 23 (4) for default to submit return. When I heard the assessees in connection with their application for a reference to the Hon'ble Court, they failed to touch on this question or to explain its meaning. What is apparently intended by the question is the submission that the assessees had submitted to the respective Income-tax Officers of those places, and could not therefore be said to have failed to make a return. I therefore amend the question for submission as follows: "Has an assessee, who has failed to make a return to the Income-tax Officer having jurisdiction over his principal place of business, but has made returns of his income at his two branch businesses to the respective Income-tax Officers, having jurisdiction over the areas in which those branch businesses are situated failed to make a return according to the terms of sub-section (4) of section 23".

My opinion on this question is as follows:—

Sub-section (1) of section 64 of the Act provides that where an assessee carries on business at more places than one, he shall be assessed by the Income-tax Officer of the area in which is situated his principal place of business. Under sub-section 4 of the same section every Income-tax Officer is, notwithstanding the above provision, vested with all the powers conferred by the Act in respect of any income accruing within the area for which he is appointed, irrespective of whether the particular income is assessed by him or not. This particular provision was, however, inserted in the Act mainly in order to permit of enquiries being made into the profits of a branch business by the Income-tax Officer of the place in which the branch is situated, since it is generally more convenient to assessees to have the accounts of their branch businesses examined locally. Returns submitted to Income-tax Officers of branch businesses are not returns of *total* income, which can only be submitted to the Income-tax Officer of the principal place of business, who is the assessing officer, and default to submit such latter is clearly failure to make a return. My opinion, therefore, is that the answer to the question is in the affirmative.

Question (e), "whether the Income-tax Officer, Darbhanga, was justified in rejecting the return and making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta", contains two questions in one, namely, (1) whether the Income-tax Officer was justified in rejecting the return, and (2) whether he was justified in making the assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta.

Now, the appeal in this case was against the order of the Income-tax Officer, which rejected the petition under section 27, and the sole question, which the Assistant Commissioner actually dealt with and was authorised by law to deal with, was the question whether the assessees were prevented by sufficient cause from making their return. The second half of question (e) "whether the Income-tax Officer of Darbhanga was justified in making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta, concerns the merits of the assessment, and the consideration of this question was prevented to the Assistant Commissioner by the proviso to section 30 that no appeal lies in respect of an assessment under section 23 (4) read with section 27. The Assistant Commissioner did not, in fact, deal with any such question, which does not therefore arise out of the appellate order. Under section 66 (2) I am not authorised to refer for the decision of the Hon'ble High Court a question which does not arise out of the appellate order, and I therefore decline to refer the second half of question (e). I refer the first half only, viz., "Was the Income-tax Officer justified in rejecting the return which was filed and making an assessment under section 23 (4)?" My opinion on this question is as follows: If my submission in regard to question (a) is found by the Hon'ble High Court to be correct, it follows that, the return purported to be filled being a nullity, and no return at all, the Income-tax Officer had no power under the Act except to reject it and make the assessment under section 23 (4). It is, therefore, submitted as my opinion that the answer to the question is in the affirmative.

K. P. Jayaswal and *R. Misra*, for the Assessees.

C. M. Agarwala, for the Crown.

JUDGMENT.

DHAVLE, J.:—In this case the Commissioner of Income-tax was required at the instance of the petitioner to state three questions. In stating these ques-

tions the Commissioner of Income-tax has said that he was given to understand that when this Court issued the rule it was stated that the rule was issued without prejudice to the right of the Income-tax Department to contend that the questions did not arise out of these particular proceedings since the assessment was made under section 23 (4) of the Income-tax Act. Mr. Agarwala who appears for the Commissioner of Income-tax has accordingly urged a preliminary objection that the questions do not arise at all. The contention is supported by the following facts.

The assessment was made in the year 1926-27. The petitioner had been carrying on business at various places, Barhaiya in the district of Monghyr, six branches in the district of Darbhanga and a branch in Calcutta. A combined notice under sections 22 (4) and 23 (2) was issued directing the petitioner to produce the accounts of all the businesses at all the places carried on by him; but in response to this notice the accounts of the Barhaiya business only were produced. Then came a second notice under section 22 (4). This was followed by references to Darbhanga and Calcutta and the Income-tax Officer discovered that the account books of the principal place of business at Barhaiya were incomplete, making it necessary to have a cross check. A further notice under section 22 (4) was accordingly issued directing the petitioner to produce at Barhaiya all the books of account relating to all the places of business. This requisition was not complied with and the Income-tax Officer proceeded to make an assessment under section 23 (4). The petitioner then applied under section 27 and when this application was rejected he appealed against the rejection to the Assistant Commissioner. This appeal also failed and the petitioner moved the Commissioner of Income-tax under sections 33 and 66 (2) of the Act.

Now Mr. Agarwala contends that the questions that an assessee is entitled to have referred to the High Court under clauses (2) and (3) of section 66 of the Act are questions of law arising out of an appellate order under section 31 or section 32, and that in the present case the only points that could have been validly raised before the Assistant Commissioner do not include the points on which questions have now been referred to this Court at the instance of the petitioner. It must be remembered that the appeal to the Assistant Commissioner was directed against an order passed by the Income-tax Officer under section 27. The application under section 27 is confined to the following grounds: (1) That the petitioner was prevented by sufficient cause from making the return required by section 22; (2) That he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23; and (3) That he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of the last-mentioned notices. Should the Income-tax Officer refuse to make a fresh assessment under section 27 on any of these grounds, the assessee is entitled under section 30 sub-section (1) to appeal to the Assistant Commissioner objecting to the refusal of the Income-tax Officer, and the proviso to section 30, sub-section (1) is to the effect that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27. There could, therefore, be no appeal made to the Assistant Commissioner against the assessment itself which was made under sub-section (4) of section 23. The only questions that could have been raised before the Assistant Commissioner were questions regarding whether the petitioner was prevented by sufficient cause from making the return required or did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the notices.

The three questions referred to us at the instance of the petitioner were not within the terms of section 27 at all. Section 27 in fact leaves little scope

for questions of law to be framed. Nor can it be urged that in the present case the questions that could arise were questions of mixed law and fact; this is clear from the Assistant Commissioner's order of the 14th October 1927.

The learned Counsel for the petitioner has endeavoured to show that the questions were in fact raised in the petition of appeal to the Assistant Commissioner. The answer to this is that even if they were raised, the Assistant Commissioner had no jurisdiction to deal with them, nor had the petitioner any right to raise them having regard to the terms of sections 27 and 30, especially in the proviso to sub-section (1) of section 30.

I would, therefore, uphold the preliminary objection of Mr. Agarwala and dismiss the reference.

The petitioner will pay Rs. 100 as costs of this hearing.

COURTNEY TERRELL, C. J.:—I agree.

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(396) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(5th August, 1930)

Raja Jyoti Prasad Singh Deo Bahadur .. *Assessee.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 3—Impartible Estate—Assignment of Royalties to junior members for maintenance—No transfer of proprietary interest in lands—Royalty income, if assessable as income of the Raja.

Where the holder of an impartible Raj settled certain coal bearing mauzas in favour of his sons under a grant resumable at his will on three months notice, entitling them to realise from the tenants the minimum royalty for coal amounting to Rs. 25,000, fixed as their maintenance allowance, while the sons were to pay themselves the local rates and cesses, pay the royalty coal to the settlor and get his consent for any resettlement of lands surrendered or sold,

HELD, that the assignment not being of the entire proprietary interest of the Raja, but merely of royalties in favour of his sons in lieu of the personal obligation to maintain them, the Rajah was assessable in respect of the income from royalties which would not cease to be his assessable income until he parted with it irrevocably.

Case [Miscellaneous Judicial Case No. 117 of 1929], stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act (XI—1922), I have the honour to state the following case for the decision of the Hon'ble High Court.

2. The facts are as follows:

Raja Jyoti Prasad Singh Deo Bahadur of Panchkote is the proprietor of the zemindary or Raja of Chakla Panchkote. This zemindary, by custom prevailing in the family, is not subject to the ordinary rules of Hindu law as regards devolution by inheritance, but is impartible, and is held exclusively by the eldest son of each successive Raja, or, in default of a son, by the member of the family next entitled to succeed. Certain members of the family, who are by this custom excluded from the actual inheritance, are entitled to maintenance from the Raja for the time being, and this maintenance may be either by way of direct money allowance, or may be provided for by the grant of landed property resumable at the death of the grantor himself or of the grantee. The present Raja has three sons. The second son and third son are, by the said family custom, entitled to maintenance. The Raja at one time proposed to allow each of them an annual allowance of Rs. 25,000, but finding himself, as he states, owing to certain expenses necessary to be incurred on behalf of the estate, unable to spare such a sum, he made over to each the collection of royalties amounting to 25,000 per annum from certain coal bearing areas, according to the request of the sons themselves. In favour of each he executed a Khorposh sanad and each son executed a corresponding ekrar or counterpart agreement. A copy of the Khorposh sanad with its schedule executed in favour of one of the said sons is annexed to this statement as an appendix. The other is said to be similar in its terms. The sanad puports to deliver possession of certain properties for the maintenance of the son. The properties in question are mouzas already leased out by the Raja to several tenants for coal mining, which tenants, under existing kabuliats, pay royalties as well as royalty coal. It is provided in the Khorposh sanad that the royalties are to be realised and retained by the son, but the royalty coal is to be made over by the son to the Raja. The son is to pay all taxes and cesses, and is responsible for the cost of realising the royalties. The son is directed to avoid neglect in realisation, and it is stipulated that he shall obtain the approval of the Raja in case of resettlement of any tenancy. The grant is dependent on good conduct and is resumable at three months' notice without objection by the son.

In assessing the Raja for the year of assessment 1928-29 the Income-tax Officer considered the royalties which were realised, in virtue of the sanad, by the respective sons during the previous year to be income of the Raja and assessable in his hands. The Assistant Commissioner upheld his decision. Under section 66 (2) the assessee had required me to state a case to the Hon'ble High Court.

3. The question of law which is referred for the decision of the Hon'ble High Court is as follows:—Is the Raja assessable, or are the sons respectively assessable, in respect of the income from the royalties in question?

4. My opinion is as follows: Royalties are assessable under section 12. The assessee's argument is that the royalties in question are not *his* income, according to the terms of that section, but the income of his sons respectively. That, however, the properties are not made over absolutely is seen from the fact that it is stipulated that the royalty coal be made over to the Raja. It is said in the sanad that possession of the properties is delivered, but it is seen from the terms of the sanad that no right in the properties is made over to the son, but only the right to collect and retain the royalties arising out of the properties in question. In particular the direction to avoid neglect and the stipulation for the Raja's approval in case of resettlement of tenants make this plain. The Raja is bound to maintain the said sons out of the income of the estate, and if, instead of making them an allowance in cash, he makes over to them the right to collect

coal royalties in certain areas, he is, nevertheless, maintaining them out of the income of the estate. My opinion, therefore, is that the income in question is assessable in the hands of the Raja.

Saiyed Hasan Imam, K. P. Jayaswal and *S. C. Mazumdar,* for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

DHAVLE, J.:—The question raised in this reference is whether it is the assessee, the proprietor of the Zamindari of Chakla Panchkote, or his younger sons, that are assessable to income-tax in respect of the income from certain royalties.

The zamindari is not subject to the ordinary rules of Hindu law as regards devolution by inheritance, but is impartible and is held exclusively by the eldest son of each successive Raja, as the holder is called, younger sons who are excluded from the actual inheritance by a kulachar or family custom being entitled to maintenance from the Raja for the time being (*Nilmony Singh Deo* v. *Hingoo Lall Singh Deo,*(1). This maintenance may be either by a direct money allowance or it may be provided by the grant of landed property, such grant being resumable on the death of the grantor by his successor and also by the grantor himself on the death of the grantee. It appears from the Korposh sanad produced in the case that the assessee fixed Rs. 25,000 a year as the maintenance allowance of his two younger sons and that in lieu of it he settled certain mauzas with them. The terms of the Sanad empower the grantee to realise from tenants "the minimum royalty and commission with interest", and they require the grantee to pay road-cess, public-works cess, or income-tax or any other tax or cess which will be legally payable on the sum realized by him.

It has been contended on behalf of the assessee that he has made over the whole of his proprietary interest in the mauzas to the grantee. But this overlooks the fact that the Sanad not only reserves to the grantor what is called the royalty coal, but also requires the grantee to obtain the grantor's approval to the resettlement of any land that may be surrendered by the tenant or purchased by the grantee in auction sales in the execution of decrees. This last reservation is on the face of it, of no small importance in these mauzas on account of the coal found or expected in them. It has been urged on behalf of the assessee that the test of what has been conveyed to the grantee should be whether or not the grantor could sue the tenants for rents or give them acquittances for rents paid by them. That test, however will not help to show whether or not the grantor has substantially parted with all his rights in the mauzas. The grant is expressly resumable on three months notice at the will of the grantor, the grantee being debarred from raising any objection to such resumption. Mr. Jayaswal has urged that this provision for resumption is in accordance with the Kulachar and is no more than a *brutum fulmen,* which will not be enforced by the Courts, but it is difficult to see, on the terms of the sanad, how the grantee could resist resumption by the grantor, especially as the contention that the maintenance of the grantee was a charge on the mauzas in question was, quite properly, given up.

The position then is that the assessee has not parted with all his proprietary rights in the mauzas but has made an assignment of the royalties, resumable at his pleasure on three months notice, in lieu of the maintenance which he was under a personal obligation to provide. It has been contended on behalf of the assessee that even so the royalties that may be recovered by the grantee under

(1) I.L.R. 5 Cal. 256.

the Sanad cannot be regarded as part of the income of the assessee. But it is well settled that where a portion of the income is withheld at the source before the income reaches the assessee, the test of whether such portion is or is not part of the assessee's income is whether the withholding merely represents the payment of a personal debt or liability of the assessee, or represents a share in the income itself to which the assessee has only a residual claim after the prior claims have been met.

In *Hudson* v. *Gribble* and *Bell* v. *Gribble*,(1) it was urged in the Court of Appeal that the income-tax, being a tax on income, could only apply to income which actually reached the hands of the tax-payer within the year, and that where by a term of a contract of service entered into voluntarily it was provided that the employer might defer payment of a portion of the salary from time to time payable to a person in his employ, for the purposes of a Thrift Fund, the portion of which payment was so deferred would not be taxable income. In negativing the contention, Methew, L. J., observed "The consequences of that contention would be very remarkable. Suppose that a marriage settlement contained a covenant by the husband to set aside a certain proportion of his income every year, and invest the sum on certain trusts for the benefit of his family; it would follow, if the argument put forward is correct, that the sum so set aside would not be taxable. Such a conclusion would, I think, be impossible". The income from the mauzas in the present case will clearly not cease to be the income of the assessee for the purposes of the Income-tax Act until he parts with it irrevocably. Such assignment as he has made of the royalties is merely in lieu of a personal obligation arising not before but after the accrual of the income to him, and once the income accrues, it is immaterial that its ultimate destination is governed by a resumable or other assignment or even by statute (*Mersey Docks and Harbour Board* v. *Lucas*,(2) and *Sowery* v. *Harbour Mooring Commissioners of Kings Lynn*(2).

I would accordingly answer the question referred to us by saying that the Raja is assessable in respect of the income from the royalties. I would also direct that the assessee pay Rs. 100 as the costs of the hearing.

COURTNEY TERRELL, C. J.:—I agree.

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(397) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice Dhavle.

(5th August, 1930)

J. E. Rutherford .. *Assessee.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 4 (3) (v) and (vii)—Estate under Court of Wards—Gratuity paid to Estate Manager on retirement—Exemption as casual income—Provident Fund balances, if exempt from assessment—Court of Wards Official, if Officer of Government.

(1) 4 Tax Cas. 522 ; L.R. (1903) 1 K.B. 517.
(2) 2 Tax Cas. 25.
(3) 2 Tax Cas. 201.

Where the assessee on retiring as Manager of an Estate under the Court of Wards was paid Rs. 75,000, being made up of a sum equal to that payable as commutation of pension on the Civil Service Regulation scale plus a fourth of that sum for his specially meritorious services, in accordance with the invariable practice of the Court of Wards which did not pay pension,

HELD that the sum must be regarded as capital sum received in commutation of pension exempt from assessment under Sec. 4 (3) (v) of the Income-tax Act, but the payment of the sum having arisen from his occupation as Manager was not exempt under Sec. 4 (3) (vii) of the Act.

Sums received by the assessee as accumulated balance to his credit as a subscriber to the Provident Fund constituted under the authority of the Government by the Court of Wards for the benefit of their officials are exempt from assessment under Sec. 4 (3) (v) of the Act. Officials of the Court of Wards are a "class of employees of Government" within the meaning of the Provident Fund Act read with the Income-tax Act.

Case [Miscellaneous Judicial Case No. 108 of 1929], stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

I have the honour to state the following case for the decision of the Hon'ble Court under section 66 (2) of the Indian Income-tax Act.

2. Mr. J. E. Rutherford was appointed an Assistant Manager under the Court of Wards, Bihar and Orissa, in 1906. In 1920 he was appointed Manager of the Bettiah Wards Estate. In June 1926 he was granted six months' leave on average pay prior to retirement, and in December 1926, he retired from service on the expiry of that leave, having reached the age limit permissible to servants of the Court of Wards. In a letter dated 28th January 1927 to the address of the Board of Revenue, sanction of the Local Government was given to the grant to Mr. Rutherford of a sum of Rs. 75,000 on his retirement. Mr. Rutherford has been able to obtain and has filed copies of the correspondence passing between the Local Government and the Board of Revenue in the matter of this grant. As the exact nature of the payment is a question at issue, I give below actual extracts from that correspondence.

The letter of the Local Government sanctioning the grant was in the following terms, viz., that sanction of Government was conveyed to the grant to Mr. Rutherford of a gratuity of Rs. 75,000 on his retirement after the expiration of his leave for six months. The nature of the gratuity was described in the following terms: "The above gratuity represents a sum 25 per cent. in excess of what would be admissible for the computation of a pension under the ordinary rules applicable to Government servants, which constitute the standard generally approved for adoption in such cases under the Court of Wards, but His Excellency in Council agrees with the Board that the special circumstances of Mr. Rutherford's case warrants the more liberal terms now authorised. The concession is granted as an exceptional measure and should not be regarded as a precedent"

The gratuity, therefore, was granted according to terms recommended by the Board of Revenue. The following extracts from the letter of recommendation by the Board of Revenue to the Local Government, which explain fully the nature of the grant and the circumstances and conditions in which it was made, are reproduced below.

"With reference to the subject of gratuity the Board considers that it will probably be acknowledged that a gratuity should be paid to Mr. Rutherford on the termination of the services. The amount at Mr. Rutherford's credit in the Provident Fund is not sufficient to maintain him after retirement. Officers of the Court of Wards, if finances of an estate permit, are treated in the same manner as Government servants. Government servants receive pension.

* * * * *

A pension cannot be paid to an officer of the Court of Wards, since it might be repudiated after the estate is released.

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These gratuities are usually calculated on the scale of pension fixed in Article 474 of the Civil Service Regulations.

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The gratuity calculated according to Table 10 will be Rs. 32,700. The Board considers that this gratuity will be insufficient, and that it is necessary that the maximum limit of pension prescribed under Article 474-B should not be retained. If the maximum limit is not retained, Mr. Rutherford will be entitled to a pension of Rs. 58,860. The Board therefore considers that an undoubted case is made out for the payment of Rs. 58,000 to Mr. Rutherford.

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Mr. Rutherford has been a subscriber to the Provident Fund Rules, since the beginning of his service but these rules up to 1920 were illiberal, the contribution of the estate was only half anna in the rupee and the estate's total contribution of Rs. 18,776 is a small one.

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Considering his duties, the Board considers that there is reason to think that the pay drawn by Mr. Rutherford during the greater part of his service as Assistant Manager was scarcely sufficient.

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Considering the rise in prices, the necessity of entertainment and the upkeep of his Manager's house and establishment generally, it could not be expected that Mr. Rutherford would be able to save on the salary given him.

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The Board is inclined to think that Mr. Rutherford might have expected a longer notice, and in view of the fact that the notice given to him was practically only a month, he ought perhaps to be more liberally treated than if a longer notice had been given to him.

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The Board understands that Mr. Rutherford has no private investments and that he will be dependent entirely on the gratuity now granted to him and the amount to his credit in the Provident Fund.

* * * * *

The Board is of opinion that there is every reason why Mr. Rutherford should be treated liberally, and, though he cannot be granted any gratuity that is not justified by rules and precedents, that the considerations mentioned above are sufficient to warrant the grant of an extra allowance of 25 per cent on the sum that can be paid to him as commuted pension under the C.S.R. This will give Mr. Rutherford an extra Rs. 14,175. The gratuity which the Board recommends is therefore Rs. 58,860 plus Rs. 14,715, *i.e.*, Rs. 73,575. This sum the Board considers will be sufficiently liberal and not excessive."

Mr. Rutherford also received a sum of Rs. 38,622 as the accumulated balance standing at his credit in the Provident Fund under the Court of Wards; of this amount Rs. 11,963 was the accumulated balance of contributions made by him; Rs. 2,926 was the interest thereon; Rs. 20,854 consisted of contributions made by the estate; and Rs. 2,877 was interest on these contributions. The contributions made by Mr. Rutherford had been in past assessments allowed as a deduction from his total assessable income, except where in any year the total amount paid as contributions to Provident Fund and as premiums on Life Insurance Policies exceeded the maximum one-sixth of total income laid down in sub-section (3) of section 15 of the Act. In such cases the amount, which exceeded one-sixth, was included in total assessable income. There is nothing to show why Mr. Rutherford's contributions were allowed as deduction. It is presumable that the deductions were allowed under sub-section (1) of section 15, the Provident Fund in question being considered by past Income-tax Officers as a Provident Fund to which the Provident Funds Act of 1897 applied.

3. The Income-tax Officer, Gaya, who assessed Mr. Rutherford in the assessment year with which we are concerned in the present reference, *viz.*, 1927-28, considered both the sums above referred to, namely, the sum of Rs. 75,000 and the sum of Rs. 38,622 assessable to income-tax in the hands of Mr. Rutherford in respect of the previous year in which the said sums were received by him, *i.e.*, the year 1926-27 which was the previous year of the 1927-28 assessment. He therefore assessed Mr. Rutherford accordingly. From the latter sum, however, he made deduction of Rs. 1,000, being the estimated amount of sums already taxed to income-tax in the hands of the assessee in the years in which the aforesaid maximum of one-sixth of total income had been exceeded. The Assistant Commissioner in appeal upheld the decision of the Income-tax Officer.

4. The assessee has required me to refer the following questions to the Hon'ble Court, arising out of the order of the Assistant Commissioner in appeal.

(1) Does the sum of Rs. 75,000 fall within the exemption of section 4 (3) (v) or (vii) of the Indian Income-tax Act?

(2) Is the sum of Rs. 37,622 exempted from taxation under the said section 4 (3) (v) as an accumulated balance at the credit of the assessee as a subscriber to a Provident Fund as contemplated by that section?

(3) If the Provident Fund in question does not fall within such Provident Funds as contemplated by the section, (a) are the past contributions of the assessees now taxable, and (b) is the portion gifted by the estate taxable under any head of income of section 6 read with section 4 (3) (vii)?

5. I am required by the terms of section 66 (2) to state my opinion on hese questions.

My opinion on question (1) is as follows: Section 4 (3) (v) lays down that the Act shall not apply to any capital sum received in commutation of the whole or a portion of a pension.

It is plainly stated in the above quoted extracts from the letter of the Board of Revenue that the Court of Wards do not pay pensions. The sum of Rs. 75,000, although calculated on the basis of an imaginary pension is unequivocally referred to as a gratuity both in the letter of the Board of Revenue and in the letter conveying the sanction of the Local Government. The sum, therefore, was not granted as a pension and cannot be held exempt under the terms of section 4 (3) (v).

As regards the claim for exemption under the terms of section 4 (3) (vii), that clause exempts "Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee." The actual letter of the Local Government conveying sanction to the grant was not signed until a month or so after Mr. Rutherford had actually retired, but it does not seem to me that it can be argued from this fact that the receipt in question did not arise out of the occupation of the assessee. The interval was too small to be material in this connection. The matter was in train for settlement before Mr. Rutherford retired. Had the interval been considerable, say an interval of several years, and had the question of the grant of the gratuity not been raised until Mr. Rutherford had actually retired, then it might possibly have been argued that the payment had nothing to do with the exercise by the assessee of his occupation. But, in the present case, the letter of the Board of Revenue above referred to directly refers and relates both the grant of the gratuity and the amount of the gratuity to the facts, circumstances and conditions of Mr. Rutherford's work as a servant of the Court of Wards and to the emoluments drawn by him during his period of service. The receipt therefore, in my opinion arose out of the exercise of the occupation of the assessee.

Moreover, the payment was in a real sense, by way of addition to his remuneration as an employee of the Court of Wards. No doubt the Court of Wards do not pay pensions, or guarantee gratuities, but allow a gratuity in each case as an act of grace. But it is none the less true that the Court of Wards do invariably pay gratuities to their deserving servants on retirement. This is plain from the extract above quoted from the letter of the Board of Revenue:—"Officers of the Court of Wards, if the finances of an estate permit, are treated in the same manner as Government servants". Officers of the Court of Wards know when they join the service of the Court that there is practical certainty of their receiving a gratuity on retirement, if their work has been considered satisfactory. If it were not for the expectation of this gratuity, the Court of Wards would have to pay higher salaries to their officers. The Board distinctly referred to the fact that Mr. Rutherford's salary at one period of his service was insufficent and also emphasised the fact that Mr. Rutherford had been unable to save on his pay. I consider therefore that the said sum was by way of addition to the remuneration of Mr. Rutherford as an employee. In my opinion the answer to question (1) is in the negative.

6. My opinion on question (2) is as follows: Clause (2) of section 2 of the Provident Fund Act of 1897 states that the Act applies to any Provident Fund constituted by the authority of Government for any class or classes of its employees. The Act has been amended by Act XIX of 1925, but the above provisions are retained in the Act as amended. Under the General Clauses Act 1897, Government includes the Government of India and the Local Governments. The question

is whether officers of the Court of Wards are a class of employees of Government. It is enacted by section 5 of the Court of Wards Act, Bengal Act IX of 1879, that the Board of Revenue shall be the Court of Wards. Section 69 of that Act further lays down that, in exercising its power under the Act, the Court is to be guided by the advice and instructions of the Governor. The Board of Revenue is a body of civil servants under the Crown in India. Under section 59 (a) of the Court of Wards Act, every person employed by the Court of Wards is for the purpose of the Indian Penal Code deemed to be a public servant, and under the Bihar and Orissa Municipal Act and the Bihar and Orissa Local Self-Government Act, the Manager of an estate under the Court of Wards has been declared to be a salaried servant of Government. In *Nizamuddin* v. *Queen Empress*, (1) there was an observation by a Division Bench of the Calcutta High Court that a Court of Wards Manager was not a public servant within the meaning of section 21, Indian Penal Code. It might be that section 59 (a) of the Court of Wards Act above referred to was specifically enacted to meet such an objection. It is, at any rate, not an unfair presumption from the fact that such specific enactments were considered necessary by the Legislature, that officers of the Court of Wards were not considered Government servants in the general sense of the term by the Legislature. My opinion is that officers of the Court of Wards cannot be said to be a class of employees of Government and the answer to question (2) is in the negative.

7. As regards question 3 (a) I accept the assessee's contention that his past contribution is not now assessable and, under section 33, I have directed the assessment to be modified accordingly. Question 3 (a) therefore does not arise and is omitted from this reference.

My opinion on question 3 (b) is as follows:—Section 4 (3) (vii) does not apply, the receipt in question, if my view expressed in regard to question (1) is accepted, arising out of the exercise of an occupation. The portion of the amount in question gifted by the estate did not accrue to the recipient until he actually received it in the previous year in question, since payment was conditional on good conduct, and until payment the amount was in the hands of and under the control of the Court of Wards. The amount must therefore be held taxable in the hands of recipient in the year of receipt unless exempt under the provisions of the Act, and there is no provision exempting the same. The answer to the question is therefore, in my opinion, in the affirmative.

K. P. Jayaswal and *Jadubans Sahay*, for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—The first question for our decision is whether the sum of Rs. 75,575 granted to Mr. Rutherford falls within the exemption of section 4 (3) paragraphs (v) or (vii) of the Indian Income-tax Act. In my opinion this payment must be regarded as a capital sum received in commutation of the whole of a pension and so falls within section 4 (3) (v) and is exempt from taxation.

The paragraph referred to makes no distinction between pensions which may be demanded as of legal right and those which are granted voluntarily and between those payable by Government and those payable by any private body or individual.

(1) I.L.R. 28 Cal. 844.

It has been the custom of the Bettiah Raj under the management of the Court of Wards to grant a lump sum to its managers when they lay down their office. This practice has been sanctioned by the Government in the cases of successive managers and it is one of the inducements offered to candidates for the office. It is recognised that there is no legal obligation upon the Raj or the Government to make the payment, but having regard to established practice it is nevertheless a matter of reasonable expectation and an incentive to accept an onerous office at a comparatively small salary and to perform the duties in an efficient manner.

The finding of fact is as follows:—"No doubt the Court of Wards do not pay pensions, or guarantee gratuities, but allow a gratuity in each case as an act of grace. But it is none the less true that the Court of Wards do invariably pay gratuities to their deserving servants on retirement. This is plain from the extract above quoted from the letter of the Board of Revenue: Officers of the Court of Wards, if the finances of an estate permit, are treated in the same manner as Government servants. Officers of the Court of Wards know when they join the service of the Court that there is practical certainty of their receiving a gratuity on retirement, if their work has been considered satisfactory. If it were not for the expectation of this gratuity, the Court of Wards would have to pay higher salaries to their officers."

It is not possible for the Court of Wards or the Government to offer the candidate a pension consisting of periodical payments because the payment might be repudiated by the owners after the estate is released from the management of the Court. Therefore the practice has been established of treating officers of the Court, if the finances of the State permit, in the same manner as Government servants, and of paying to them a sum equal to that payable as commutation of pension on the scale set forth for such commutation appended to the Civil Service Regulations plus in very meritorious cases one forth of such amount. Mr. Rutherford's case was considered as specially meritorious and he was granted a sum of Rs. 58,860 as calculated by the Regulations plus one-fourth of that sum amounting in all to Rs. 75,575. The candidate therefore enters upon his office under the Court of Wards with a definite salary and the expectation that he will receive at the end of his service the equivalent of a pension but he knows that he will not after his retirement be given a series of periodical payments but in lieu thereof he will get a lump sum. In other words he is to get a pension which will certainly be commuted.

It is argued by Counsel for the Crown that this payment is a gratuity and not a pension. The single sum paid in commutation of a pension may be a gratuity but it is none the less exempt from taxation on that account.

It is true that in the Government letter which sanctioned the payment to Mr. Rutherford it is repeatedly emphasised that the payment is in the nature of a gratuity but even if the term does not include a commuted pension the terms employed by the Government or the recipient to describe the transaction are immaterial. As in the case of the terms "penalty" and "liquidated damages" the real nature of the transaction must be found as a matter of fact and then the Court must decide as a matter of law whether the terms used in the statute are applicable to such facts.

It was argued for the Crown that in order to make the payment a sum paid in commutation of a pension there must first be pension and that the commutation must follow in point of time. But this argument is not well founded. The Government might in view of the political situation or for any other reason decide in future to commute all pensions, and persons appointed to Government service

might enter upon their office on those terms. The sums received at the termination of service would none the less be in commutation of pension although no single payment of an instalment of pension was ever made to the officer.

The assessee argues that the payment is also exempt from taxation under paragraph (vii) of section 4 (3). But in order to qualify for this exemption the payment must present two characteristics:—(1) it must not have arisen from business or the exercise of a profession, vocation or occupation and (2) it must be of a casual and non-recurring nature. In my opinion it has neither of these qualities. As I have pointed out, Mr. Rutherford may be taken to have been induced to accept the office of Manager by the prospect of a commuted pension and the payment must be considered as having "arisen from" his occupation. The facts that it was granted after his service had ended and that there was no obligation to pay it are immaterial—see: *Turner Morrison and Co., Ltd.* v. *Commissioner of Income-tax, Bengal* (1). To use a humble analogy the tip given to a waiter at a restaurant by a departing guest arises from the waiter's occupation. And being a matter of reasonable expectation, and not merely a matter of hope (as would be the chance of winning a sweepstake) it cannot be considered as of a casual nature.

I would answer the first question submitted to us by saying that the payment in question is exempt under section 4 (3) (v) but not under paragraph (vii).

The second and third questions relate to sums received by Mr. Rutherford from the Provident Fund to which he has contributed for many years. Under section 4 (3) (v) the accumulated balance at the credit of a subscriber to a Provident Fund to which the Provident Funds Act of 1897 applies is exempt from income-tax. That Act was repealed and partially re-enacted by the Provident Funds Act of 1925 and it applies (clause (2) of section 2) to any Government Provident Fund "constituted by the authority of Government for any class or classes of its employees or of persons employed in Educational institutions or employed by Bodies existing solely for Educational purposes," and by section 8 of the new Act it is also to apply to a Provident Fund for employees of a local authority if the local Government shall so notify in the local official gazette. To my mind it is clear that the object of the Provident Funds Act is to facilitate the constituion of Provident Funds whose stability may be assured by Government approval for the benefit of persons employed by Government or local authorities. It is unlikely that the Government on the one hand or a local authority on the other would consitute Provident Funds for the benefit of persons who are not in service either of the Government or of the local authority as the case may be. Governments and local authorities employ different classes of employees, each class having its own particular importance, responsibility, and closeness of relationship to the employing authority and there will of course be differences in the nature of the employment itself. The test of whether any individual person is an employee of the authority for the purposes of the Provident Funds Act is rather whether the authority admits that person to membership of the Provident Fund constituted by it than the particular nature of his employment or his precise legal relationship with the employer.

The officials of the Court of Wards employed in the Bettiah Estate contribute to a Provident Fund which was constituted by the authority of Government for their benefit. For several years past Mr. Rutherford has so contributed and he has now drawn a sum of Rs. 38,622 as the accumulated balance due to him. Of this amount Rs. 14,889 represents the sum together with accumulated interest contributed by Mr. Rutherford and Rs. 23,731 is the amount contributed together with interest by the estate, the contributions made by Mr. Rutherford have in past assessments been allowed as a deduction from his total assessable income.

(1) 3 I. T. C. 214

The Department does not now claim to recover income-tax in respect of the contributions by Mr. Rutherford. It is clear that the exemption of Mr. Rutherford's contribution to the Fund from past assessments was due to the provisions of section 15 (1) of the Income-tax Act. That section is as follows:—"The tax shall not be payable by an assessee in respect of any sums paid by him.....as a contribution to any Provident Fund to which the Provident Funds Act 1897. applies."

It will be seen that the Department has hitherto always treated this Provident Fund as one to which the Provident Funds Act applies. There is an elaborate Manual for the guidance of officers of the Court of Wards and Appendix S of this Manual sets forth the rules for Provident Funds of Estates under its management: the officer contributes so much (deducted from his salary) and the funds of the estate contribute a proportionate amount and the sums so contributed are paid into the Post Offices Saving Bank to draw interest and on retirement the officer may withdraw his contribution and accumulated interest plus the proportionate contribution by the estate with accumulated interest. The Fund is under the management and control of the Collector of the District.

It is noteworthy that by the Government Management of Private Estates Act (Act X of 1892, section 2 (3)) it is enacted that the phrase "Private Estates under Government management" is to include "Estates under the Court of Wards."

It is now however argued that although this fund was admittedly constituted under the authority of Government, it was not so constituted for the benefit of any class or classes of its employees since officials of the Court of Wards do not, it is said, fall within that category of persons. The question we have to answer depends therefore upon the answer to the preliminary question whether officers of the Court of Wards belong to any class of Government employees.

Now various enactments have dealt with the status of officers of the Court of Wards for various specific purposes. Under the Penal Code such an officer is a "public servant," so that if he should be fraudulent he may receive the heavier punishment awarded to such servants (section 59A of the Court of Wards Act).

Under the Bihar and Orissa Municipal Act and the Bihar and Orissa Local Self Government Act, the manager of an estate under the Court of Wards has been declared to be a "salaried servant of Government," and it was held by Mr. Justice Mullick in Hamond's Election Cases Vol. II, p. 99 that a Manager under the Court of Wards is a Government servant under the Government of India Act. In these circumstances it seems to me extraordinary that an officer of the Court of Wards cannot be said to fall within any class of employees of Government. It must be remembered that the phrase "class of employees of Government" must be construed having regard to the Provident Funds Act, and, as I have endeavoured to show, the phrase in that Act was not intended to have any narrow significance. The object of the Act was the establishment and protection of Provident Funds constituted by the authority of Government for public servants and not to define with any strictness the class of persons who might be admitted to membership of the Fund.

It is urged on behalf of the Crown that the salary of an officer of the Court of Wards is a charge upon the estate and is not borne by the Government, and it is said further that the business of the officer is to look after the interests of the Ward. These considerations are not sufficient to prevent the officer belonging to

"any class of Government employee." The officer is appointed by the Government, his salary is fixed by the Government, he has to obey the orders of the Government and he can ignore the orders or requests of the Ward. The fact that he receives his salary from the funds of the Estate merely means that the Government directs him to help himself from those funds to the defined extent: or in other words the Government had and exercises the power to direct the Ward to pay out of the Ward's own pocket the salary of a particular class of Government employees.

The question put to us is "is the sum of Rs. 37,622 exempted from taxation under the said section 4 (3) (v) as an accumulated balance at the credit of the assessee as a subscriber to a Provident Fund as contemplated by that section." In my opinion this question should be answered in the affirmative.

The remaining question, having regard to the answer to No. 2, does not now arise.

DHAVLE, J.:—I agree in the order proposed.

In support of the argument that the sum of Rs. 75,000 granted to the assessee was not a "capital sum received in commutation of the whole or a portion of a pension," Mr. Agarwala laid stress on two facts. The first was that section 7 of the Act makes gratuities as well as pensions taxable, and the second that the sum in question was given to the assessee not as a pension but expressly as a gratuity. In the case of a payment of this kind—a payment in consideration of past services—pensions and gratuities seem to be generically indistinguishable excepting so far as pensions spell periodical payments.

The Civil Service Regulations do not apply *proprio vigore* to employees under the Court of Wards, but the payment to the assessee was calculated on the basis of Article 474 of those Regulations. The definition of pension given in Article 41 of the Regulations is that "except when the term 'Pension' is used in contradistinction to Gratuity, Pension includes Gratuity." Under Article 474 "the amount of a pension is regulated as follows:—(a) After a service of less than 10 years, a gratuity not exceeding one month's emoluments for each completed year of service.....; (b) After a service of not less than 10 years, a pension not exceeding the following amounts....." The amount paid to the assessee was calculated on the basis of clause (b) and then capitalised, in accordance with Appendix No. 10 of the Appendices to the Civil Service Regulations, by multiplying by 98.1. The maximum "gratuity" under the Article is 9 times the monthly emoluments of the retiring officer, while the amount given to the assessee is nearly 33 times his monthly emoluments. The distinction made in Article 474 of the Civil Service Regulations between gratuities and pensions has little application to section 7 of the Income-tax Act, but the considerations that I have set out go far to show how the so-called gratuity given to the assessee is essentially identical in nature with a commuted pension.

Mr. Agarwala has contended that no pension was admissable to the assessee and that therefore there was nothing to commute, and it was in fact on this basis alone that he asked that a distinction be made in the present case between a gratuity and a commuted pension. The answer to this contention is that the precise term used is of little moment in interpreting the Income-tax Act. What must be looked at is the real nature of the sum in question, and it is clear from the official correspondence that what was given to the assessee on his retirement from service was but the equivalent of a commuted pension in essence, in spite of the technical reason for which it was recommended and sanctioned under the denomination of a gratuity. I agree therefore that the sum of Rs. 75,000 does fall within the exemption of section 4 (3) (v).

The assessee's contention that that sum also comes within section 4 (3) (vii) must plainly be rejected.

The next question to consider is whether that portion of the amount standing to the credit of the assessee in the Provident Fund which was contributed by the Bettiah Estate is exempt from taxation as "the accumulated balance at the credit of a subscriber to any such Provident Fund" *i.e.*, a Fund to which the Provident Funds Act, 1897 applies. Mr. Agarwala has conceded that the Provident Fund of the Bettiah Wards Estate was constituted by the authority of the Government, and the only point for decision is whether that fund could be said to have been constituted "for any class or classes of its employees," *i.e.*, of employees of the Government. If these words be strictly construed, I doubt very much whether the answer could be in the affirmative. Under section 20 of the Court of Wards Act, (Act IX (B.C.) of 1879), it is the Court—and not Government—that is to appoint a Manager for the property of a Ward. Section 14 authorises the Court, "through *its* Manager" to do all such things requisite for the proper care and management of any property....."; section 39 empowers "every Manager appointed by the *Court*" to manage all property which may be committed to his charge; and section 41 deals with the specific duties of "every Manager appointed by the *Court*."

At various places in the Wards Manual we find a distinction made between those employees under the Court of Wards who are Government officers and those who are not. Rule 132 at page 89, for instance, lays down a special procedure for dealing with applications for leave from "Government officers transferred to the Court," and Rule 63 (at page 284) of the "Rules regarding grant of travelling allowance to employees under the Court of Wards" enables the Manager to authorise any of the officers subordinate to him to proceed on duty beyond his jurisdiction, but lays down a special provision that "in the case of Government servants journeys outside the province require the sanction of the local Government." The last paragraph of Rule 141 at page 93 of the Manual deals with the "class" to be assigned to "employees who are Government officers" for the purposes of the travelling allowance rules. The Model Rules for the management of Provident Funds (at pages 250 et seq) are apparently intended for servants or employees of Wards and other estates, including all non-pensionable employees holding substantive appointments with a salary of more than Rs. 10 a month; and though Rule 2 of these Rules provides that "every servant" shall be required to subscribe at a given rate, there is a note under the Rule to the effect that "a Government servant" in receipt of pension from Government is not permitted to subscribe to the Provident Fund.

The employees of an estate under the Court of Wards are, moreover, paid not from public revenues but from the funds of the estate. It is true that the Court of Wards is constituted by the Board of Revenue and that in the exercise of its powers and in the discharge of its duties the Court is guided by such orders and instructions as it may from time to time receive from the Lieutenant Governor (*vide* section 69 of the Court of Wards Act). But the specific sections and rules to which I have referred make it clear that for the purposes of the Court of Wards Act at any rate, a distinction is made, wherever necessary, between Government and non-Government officers serving estates under the Court of Wards. Mr. Jayaswal has referred to Article 750 of the Civil Service Regulations, and contended, from the mention of "Managers of Court of Wards Estates" in the examples under the second part of the Article, that such Managers are a class of Government servants. To my mind this is a complete misapprehension of the Civil Service Regulations. Article 750 deals with the two kinds of Foreign Service to which Government officers may be deputed, and provides that the foreign service to which a Government officer may be deputed for working

as the Manager of a Court of Wards Estate is foreign service of the second kind. In other words, what it does show is not that all Managers of estates under the Court of Wards are Government servants, but that it is permissible to depute officers already in the employ of Government to work as such managers.

We are, however, now concerned to construe neither the Court of Wards Act nor the Civil Service Regulations, to which reference has been made at the Bar, but the Provident Funds Act read with the Income-tax Act. In this connection it is not altogether unimportant to note that for about 20 years the assessee's contributions to the Provident Fund of the Bettiah estate were treated by the Income-tax Department as coming within the exemption. It has been conceded that that does not create any estoppel—there can be no estoppel against a statute, of course—but the continued treatment of the assessee's contributions in the past shows that he is not unreasonable in contending that this Provident Fund should be regarded as coming within section 2 (d) of the Provident Funds Act (now Act XIX of 1925). As my Lord the Chief Justice has pointed out, the object of the Provident Funds Act was evidently the establishment and protection of Provident Funds set up by Government for public servants and not the defining with any strictness of the class or classes of persons to be admitted to membership of such a fund. Not only is the Provident Fund in question conceded to have been constituted by the authority of Government, but there is also in the case of the present assessee the further consideration that his appointment and his retirement were in fact referred by the Court of Wards to Government. A taxing statute must, moreover, receive a construction in favour of the subject where any doubt arises, and I agree that in the present case the test of whether the assessee was an employee of Government for the purposes of the Provident Funds Act may be taken to be not the particular nature of his employment or his precise legal relationship with Government (as distinguished from the Court of Wards), but whether or not it was with an authority traceable to Government that he was admitted to the membership of the Provident Fund. Judged by this test, it seems clear that the assessee is entitled to exemption under section 3 (4) (v) in respect of the contributions in question.

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(398) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice, Mr. Justice Kulwant Sahay, Mr. Justice Fazl Ali, Mr. Justice James and Mr. Justice Dhavle.

(7th August, 1930)

Surajmull Brijlal .. *Assessees**.

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 66 (2)—Patna High Court, Letters Patent—Prerogative writ of Mandamus, jurisdiction to issue—Calcutta High Court, power to issue writ—Specific Relief Act, Sec. 45—Amendment of Sec. 66 (2), Desirability of.

* I.L.R. 10 Pat. 218; 11 Pat. L. T. 839; A. I. R. (1930) Pat. 538.

The Patna High Court has no power to issue the prerogative writ of Mandamus and since the passing of the Specific Relief Act the Calcutta High Court has no power to issue this writ apart from the terms of Sec. 45 of the Specific Relief Act.

The desirability of amending Sec. 66 (2) of the Income-tax Act so as to include orders passed by the Commissioner of Income-tax under Sec. 33 of the Act, or of making some other provision making arbitrary and unreasonable orders of the Commissioner of Income-tax liable to be questioned before superior authority pointed out.

Application [Miscellaneous Judicial Case No. 96 of 1929] praying for the issue of a Writ of Mandamus to direct the Commissioner of Income-tax, Bihar and Orissa, to state a case for the opinion of the High Court.

S. C. Bose, for the Assessees.

Government Advocate, for the Crown.

JUDGMENT.

FAZL ALI, J.:—This matter comes before us in connection with an application made by Messrs. Surajmull Brijlal before a Division Bench of this Court praying for a writ of Mandamus against the Commissioner of Income-tax of Bihar and Orissa directing him to cancel and vacate a certain order passed by him against the firm on the 12th February, 1929. The learned Judges to whom the application was made were of opinion that before dealing with the application on its merits it was necessary to decide whether this Court had the power to issue the "prerogative writ of Mandamus" and as it appeared to them that the question was one of far reaching importance, they referred it to a Full Bench.

The prerogative writ of Mandamus as the term is understood in England, is to be carefully distinguished on the one hand from the Mandamus which can be granted by any of the superior Courts at Westminister to examine witnesses in India or any place under the British dominion in foreign parts and on the other from such injunctions, mandatory or prohibitory, as are issued by the Courts of this country as well as in England in suits or action. It is in form a command issued in the King's name from the King's Bench Division of the High Court of Justice and directed to any person, corporation or inferior Court of Judicature requiring him or them to do something therein specified which appertains to his or their office and which the Court holds to be consonant to right and justice. It is used principally for public purposes and to compel performance of public duties though it may also be used to enforce private rights when they are withheld by public officers. By the phrase "prerogative writ" is meant a writ issued not as an ordinary writ of strict right but at the discretion of the Sovereign acting through that Court in which the Sovereign is supposed to be personally present. So far as this country is concerned section 45 of the Specific Relief Act now empowers the High Courts of Calcutta, Madras, Bombay and Rangoon to make orders which secure the same result as the writ of Mandamus issued by the King's Bench Division and the conditions which are set forth in that section are substantially the same as those under which the writ of Mandamus is issued in England. It is noticeable that the Patna High Court is not included in section 45 of the Specific Relief Act and one of the questions which we will have ultimately to consider will be whether this Court possesses the power to issue the prerogative writ of Mandamus notwithstanding the fact that it is not referred to in section 45 of the Specific Relief Act

It appears that the very question which we are now called upon to decide was raised but left undecided in the case of *Krishna Ballav Sahay* v. *His Excellency the Governor of Bihar and Orissa* (1) though the observations made by Sir Jwala Prasad, who was one of the Judges before whom the case was argued, sufficiently indicate that he was inclined to take the view that this Court has no power to issue a writ of Mandamus. The argument of Sir Jwala Prasad in that case, though succinctly put, appears to me to be irrefutable and sufficient to dispose of the issue before us. I will, however, deal with the matter in some detail, because the question raised is one of considerable public importance and it was argued at great length both by Mr. Bose who appeared for the applicants and by the learned Government Advocate who appeared for the Income-tax Department.

The argument of Mr. Bose briefly is that the Calcutta High Court undoubtedly had and still has the power to issue the writ of Mandamus and that power has been inherited by the Patna High Court. Mr. Bose traces the origin of this power to the Charter granted to the Supreme Court at Fort William in Bengal in the year 1774 and it is contended by him that the Calcutta High Court having succeeded to almost all the powers which were originally possessed by the Supreme Court, has the power to issue the writ independently of the provisions of the Specific Relief Act. There is no doubt that Mr. Bose is correct when he says that the Supreme Court had the power to issue not only the writ of Mandamus but also other prerogative writs such as Habeas Corpus and Certiorari. This is clear from clause 21 of the Charter which says that "the Supreme Court of Judicature at Fort William in Bengal is hereby empowered and authorised to award, and issue a writ or writs of Mandamus, Certiorari, Precedendo or error.....and directed to such Courts or Magistrates as the case may require and to punish any contempt or a wilful disobedience thereunto by fine or imprisonment." It may also be mentioned that similar powers were possessed by the Supreme Courts of Madras and Bombay also. The three Supreme Courts were abolished by the Indian High Courts Act of 1861 (24 and 25 Vict. Chapter 104) and section 9 of this Act provided among other things that subject to the provisions made in the Letters Patent which were to be issued later "the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such mentioned Courts." There cannot therefore be any dispute that when the Supreme Court at Fort William was replaced by the High Court, the latter inherited most of the powers which the Supreme Court had, including the power to issue the prerogative writs of Mandamus, Habeas Corpus and others.

A question, however, has sometimes been raised as to whether the power of the three Presidency High Courts to issue these writs was confined to the Presidency town or also extended to the towns in mufussil. This question arose because of the limited area over which the three Supreme Courts exercised their jurisdiction. The limits of the jurisdiction of the Supreme Court at Fort William were described in the first report of the Commissioners appointed in 1853 to consider the reform of the Judicial establishments of India in these words: "The local jurisdiction of the Supreme Court at Fort William is limited to the town of Calcutta which for this purpose is bounded on the one side by the river Hooghly and on the other side by what is called the Maharatta Ditch. Within these limits the Court exercises all its jurisdiction, Civil and Criminal, over all persons residing within them.....in like manner the court exercises all its jurisdition over all British born subjects, that is, persons who have been born in British India and their descendants who are residents in any of the provinces which are comprehended within the Presidency of Bengal or the subordinate Government of Agra."

(1) I. L. R. 5 Pat. 595.

It is true that the Commissioners further refer to a few special cases where persons not living within the limits of the town of Calcutta could also be dealt with by the Supreme Court, but it is clear that the ordinary jurisdiction of the Court was to be exercised within the limits referred to in the above passage. The learned Government Advocate suggests that this is probably the reason why section 45 of the Specific Relief Act, which now defines the powers of the High Courts at Calcutta, Madras and Bombay to issue orders in the nature of Mandamus, expressly provides that such orders are to be issued only within the local limits of their original civil jursdiction which does not extend beyond the Presidency towns.

Similarly in the case of *R. V. Nataraja Iyer* (1) Sundara Ayyar J. has after a most elaborate and illuminating discussion of the subject expressed the view that the Madras High Court had no power to issue a writ of Certiorari on an officer outside the Madras Presidency town. In the same case, however, Sadasiva Ayyar, J., was inclined to take a different view and it has now been held in several reported cases that the powers of the three High Courts to issue the writ of Haebeus Corpus are not confined to the local limits of their ordinary original civil jurisdiction and that they may issue such writs even outside these limits. The leading case on the subject is the case of *Amir Khan*(2) in which Mr. Justice Norman after referring to a number of instances in which the writ of Habeas Corpus had been issued to persons in the muffussil since the year 1794 observed that it was not without surprise that he had heard the Advocate General challenge the jurisdiction of the High Courts to issue writs into the muffussil. The case of *Amir Khan* (2) was referred to with approval by a Full Bench of the Madras High Court in *In re: Erade Padinheredil Govindam Nair* (3) where it was held that the High Courts having succeeded to the powers of the Supreme Court had the power to issue writs of Habeas Corpus outside the Presidency towns and the same view was affirmed in *Mahomedali Allabux* v. *Ismail Abdulali and another* (4). It may therefore be assumed in favour of the applicant in this case that the High Court of Calcutta, when it replaced the Supreme Court at Fort William had the power to issue the prerogative writs even outside the limits of the Presidency towns.

The question however which is still to be decided in this case is as to how this power has been affected by sections 45 and 50 of the Specific Relief Act and whether the High Court of Calcutta has the power to issue any writ of Mandamus since the passing of this Act apart from the provisions of section 45. Section 45 provides that the High Courts of Judicature at Fort William, Madras, Bombay or Rangoon may make an order requiring any specific act to be done or forborne within the local limits of its ordinary civil jurisdiction, by any persons holding a public office, whether of a permanent or a temporary nature or by any corporation or inferior Court of Judicature provided certain conditions set forth in the section are fulfilled. Section 50 clearly says that neither the High Court nor any Judge thereof shall hereafter issue any writ of Mandamus. The plain construction of these two sections would lead one to conclude that the High Courts of Calcutta, Madras and Bombay have no longer any power to issue the writ of Mandamus except under the conditions prescribed by section 45 of the Act. Mr. Bose, however, asks us to keep in view the distinction between the prerogative writ of Mandamus or command issued from the High Court of Justice in the name of the King and a Mandamus or order which issues in an action. He also refers to the English Judicature Act of 1873 section 25 sub-section (8) and Order 54 rule 4 of the Supreme Court Rules and argues that as these provisions have not affected the power of the King's Bench to issue the prerogative writ of

(1) I. L. R. 36 Mad, 72.
(2) 6 Beng. L. R. 392.
(3) I. L. R, 45 Mad. 922.
(4) I. L. R. 50 Bom. 616.

Mandamus, so the Specific Relief Act could not have been intended to affect the power of the Calcutta High Court to issue such a writ.

So far as the effect of the Judicature Act is concerned Mr. Bose's contention is, I think, correct because as long ago as in 1876 in *Glossop* v. *Hestonand Isleworth Local Board* (1) Brett, J., remarked:—"I think the mandamus spoken of in the 8th sub-section of the 25th section of the Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act or something to be done, which is the result of an action where an action wil lie." There is however a marked difference between the language of the Specific Relief Act and that of section 25 clause 8 of the Judicature Act, 1873 which runs as follows:—"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

Now section 44 of the Letters Patent of the Calcutta High Court clearly provides that the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and there is no doubt that even if the Calcutta High Court possessed the power to issue the writ of Mandamus such power could be taken away or curtailed by the Act of the Governor-General in Legislative Council. In fact even Mr. Bose does not dispute this proposition before us probably because though the contrary view was put forward on more than one occasion, it has been always negatived. The whole question therefore is what was meant by the Legislature when section 50 of the Specific Relief Act was enacted. In my opinion the language of the section is so clear and so unqualified that it is difficult to hold that the Calcutta High Court or any of the High Courts referred to in Chapter VIII of the Specific Relief Act have still any power to issue the prerogative writ of Mandamus in spite of section 50 of the Specific Relief Act. If the matter admitted of any doubt, that doubt could be removed by a mere reference to the schemes of Chapters VIII, IX and X of the Act. The heading of Chapter VIII shows that it relates to the enforcement of public duties; and the provisions of section 45 also indicate that that section was meant to deal with those cases where the prerogative writ of Mandamus would have been formerly issued. Chapters IX and X on the other hand deal with injunctions generally and the provisions made by sections 53, 54 and 55 deal with those forms of injunctions which are generally issued in suits or actions. I may state here that even Mr. Bose concedes that he does not know of any case in which the prerogative writ of Mandamus has been issued by the Calcutta, Madras or Bombay High Court since the year 1877 when the Specific Relief Act was passed, which fact, though not conclusive by itself, goes a long way to show that there is no power any longer in the Calcutta High Court or the other Presidency High Courts to issue the prerogative writ of Mandamus apart from the provisions of section 45 of the Specific Relief Act.

It will be interesting also to note that in *In re Jatindra Mohun Sen Gupta* (2) which was a case under section 45 of the Specific Relief Act. Mr. Justice

(1) 12 Ch. Div. 102 at p. 122. (2) I. L. R. 51. Cal. 874.

C. C. Ghose took pains to point out, while discussing the principles under which Mandamus was to be granted, that the Writ of Mandamus was a highly prerogative writ and was granted to appliate justice and to preserve a right where there is no specific legal remedy. In fact the manner in which the application for a Mandamus was treated in that case shows by itself that in the opinion of the learned Judge there was no distinction between the principles on which a prerogative writ of Mandamus used to be granted and the principles on which a Mandamus under section 45 of the Specific Relief Act is now granted. In *Alcock Ashdown and Co., Ltd.* v. *The Chief Revenue Authority of Bombay* (1) the whole question was discussed on the footing of section 45 of the Specific Relief Act and there was no reference to there being any power in the Bombay High Court apart from that provision. I also notice that in *The Legal Remembrancer* v. *Moti Lal Ghosh* (2) one of the arguments urged on behalf of the respondent was that there was no longer any power in the High Court to issue the writ of Mandamus and *In the matter of G. A. Natesan and K. V. Ramanathan* (3) at page 136 Coutts Trotter, J. distinctly observed as follows:—"The proceedings are taken under section 45 of the Specific Relief Act and are obviously analogous to proceedings for the obtaining of English prerogative writ of Mandamus. The writ of Mandamus has been abolished in this country and care must be taken to see that the analogy of the English cases does not lead one outside the words of the Indian Statute."

In my opinion therefore it is quite clear that since the passing of the Specific Relief Act the Calcutta High Court has no power to issue the prerogative writ of mandamus apart from the terms of section 45 of the Specific Relief Act. This being so, it is clear that the Patna High Court which was constituted long after the Specific Relief Act had been passed could not have inherited any power to issue the prerogative writ of Mandamus.

There is one more aspect of the case which might be referred to here. So far as the writ of Certiorari is concerned, it has been held that the Presidency High Courts have the power to issue such writs independently of the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure Code. This was the view taken by the Privy Council in *Mrs. Annie Besant* v. *The Advocate General of the Government of Madras* (4). Similarly in the case of *Mahomedalli Bux* v. *Ismail Abdullali* (5) it was held by the Bombay High Court that the common law powers granted to the Supreme Court by its charter to issue writs of Habeas Corpus are retained by the High Court and have not been abrogated by the provisions of sections 491 and 491A of the Criminal Procedure Code, though it may be mentioned that this view does not seem to have found favour with Rankin, C. J., in *Girindra Nath Banerjee* v. *Birendra Nath Pal* (6). However that may be, these decisions can be of no avail to Mr. Bose because neither sections 491 and 491A of the Criminal Procedure Code nor sections 435 and 115 of the Criminal Procedure Code and the Civil Procedure Code respectively, expressly take away the powers of the High Court to issue writs of Certiorari and Habeas Corpus. On the other hand so far as the writ of Mandamus is concerned, section 50 of the Specific Relief Act expressly takes away that power from the High Court mentioned in Chapter VIII and therefore it cannot be held that the power is still retained by these High Courts.

I will now assume for the purpose of my argument that the Calcutta High Court still has the power to issue the prerogative writ of Mandamus. I will also

(1) I. T. C. 221.
(2) I. L. R. 41 Cal. 172.
(3) I. L. R. 40 Mad. 125 at p. 136.
(4) I. L. R. 48 Mad. 146.
(5) I. L. R. 50 Bom. 616.
(6) I. L. R. 54 Cal. 727.

assume that the Calcutta High Court had the power to issue the writ of Mandamus into the districts which now form the separate province of Bihar and Orissa. It is however clear from clause 9 of the Letters Patent of the Patna High Court that on the 1st March 1916 whatever jurisdiction the Calcutta High Court had over these tracts ceased. The question therefore which is to be considered now, is whether there is anything in the Letters Patent of the Patna High Court to indicate that this High Court was also invested with the power of issuing prerogative writs in the same way as the Calcutta High Court had the power.

Mr. Bose frankly concedes that beyond the recitals which precede the operative portion of the Letters Patent, there is nothing to show that the Patna High Court was invested with the powers which were formerly possessed by the Calcutta High Court. In my opinion these recitals are no more than mere historical allusions to certain provisions of the High Courts Act of 1861 which was enacted just before the establishment of the High Court of Calcutta, and of the two successive Letters Patent under which the Calcutta High Court was established and its power defined. In fact in the recitals there is not merely a reference to the Calcutta High Court but also a reference to the establishment of the High Court at Allahabad in the year 1866 and this is quite enough to show that the allusions were merely historical. Besides the Letters Patent of the Patna High Court clearly define the civil, criminal, admiralty, testamentary, matrimonial and other jurisdictions of the High Court and if it was intended that the Patna High Court should possess the power of issuing prerogative writs similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras, there seems to be no reason why this could not have been provided by an express clause to that effect.

There is one other matter which deserves notice, in this connection. The Specific Relief Act was enacted several years after the Allahabad High Court had been established. The fact therefore that there is no reference to the Allahabad High Court in section 45 of the Act has been taken to mean that the Allahabad High Court was not intended by the Legislature to have any power to issue the writ of Mandamus. (See Pollock and Mulla's Specific Relief Act, 5th Edition, page 932 and Banerjee's Specific Relief Act 2nd Edition Appendix A page 138). In 1918 in the case of *Mrs. Annie Besant* v. *The Advocate-General of the Government of Madras* (1) the Privy Council while pointing out that the three High Courts of Calcutta, Madras and Bombay possessed the power of issuing a writ of Certiorari added:—"Whether any of the other Courts which are by definition High Courts for the purposes of this Act (The Press Act) have the power to issue writs of Certiorari is another question." Again by the amending Act II of 1923 the High Court of Judicature at Rangoon was included within section 45 of Specific Relief Act but neither the Patna nor the other High Courts were included. This clearly indicates that the intention of the Legislature was that the power of issuing Mandamus was to be exercised only by the High Courts mentioned in section 45 of the Specific Relief Act. The reason why the Patna, Allahabad and Lahore High Courts have not been included is not quite clear though it may be that what the Legislature intended was that the power should be confined only to those High Courts which had been invested with Original Civil Jurisdiction.

However that may be, it appears to me that it is difficult to hold in the present state of the law that the High Court at Patna has the power to issue the prerogative writ of Mandamus. I express this view with all the greater confidence, because as I have already said, Sir Jwala Prasad was inclined to take the same view in the case of *Krishna Ballav Sahay* v. *His Excellency the*

(1) I. L. R. 43 Mad. 146.

Governor of Bihar and Orissa (1) and also because the following observations made by Sir Dawson Miller in *Trikamji Jivandas* v. *The Commissioner of Income-tax* (2) point to the same conclusion:—"In the Bombay case cited which was a decision of their Lordships of the Privy Council section 45 of the Specific Relief Act which gives the three High Courts in the Presidency towns power to make orders in the nature of mandamus requiring specific acts to be done or forborne by persons holding a public office was relied on but that section does not confer the same powers on this High Court."

I should like here to remark that merely because I find that this Court does not possess the power to issue the prerogative writs of Mandamus I do not mean to suggest that this Court should not have such a power or that there is really any valid ground for discriminating between the four High Courts included in section 45 of the Specific Relief Act and the other High Courts which have not been so included. In my opinion to justify the giving of the power to the four High Courts and not giving it to the others requires a stronger argument than this that the former possess ordinary original civil jurisdiction while the latter do not possess such jurisdiction. As was pointed out by the Privy Council in *Alcock Ashdown and Co., Ltd.* v. *The Chief Revenue Authority of Bombay* (3) the order of the High Court to the Chief Revenue Officer to do his duty would not necessarily be the exercise of original jurisdiction. Similarly in the case of *Amir Khan* (4) Norman, J., said:—"I may observe, however, that the issuing of the high prerogative writ of Habeas Corpus ad subjiciendum is not a matter of ordinary original civil jurisdiction."

It appears to me that the correct way to approach the question is to enquire whether there is any good reason for supposing that cases similar to those which are dealt with by the Calcutta, Bombay, Madras and Rangoon High Courts under section 45 of the Specific Relief Act could never arise in the other High Courts. It is unnecessary for me here to discuss the circumstances under which such cases might conceivably arise even in this High Court but as the case with which we are dealing at present happens to be one under the Income-tax Act, I would like to take this opportunity to point out there is an obvious defect, perhaps wholly accidental, in section 66 of the Act as it stands at present which is apt to lead to hardship in certain cases. It will be noticed that there is no clear provision in this section which would make an order passed by the Commissioner of Income-tax of his own motion under section 33 imposing tax and penalty, subject to reference even though the tax and penalty might have been imposed contrary to the provisions of the Act.

As an order of the Assistant Commissioner passed in appeal under section 31 and that of the Commissioner passed in appeal under section 32 are subject to the provisions of section 66 clauses (2) and (3), it is anomalous that the order of the Commissioner passed on his own motion imposing tax and penalty should not be subject to the same provision. What would be the position, it may be asked, where the Commissioner of Income-tax in an appeal heard under section 32 sets aside the assessment but subsequently calls for the record *suo motu* under section 33 and himself makes an assessment; or where the tax and penalty imposed by the Income-tax Officer having been set aside by the Assistant Commissioner in an appeal under section 31, the Commissioner purporting to act under section 33 calls for the record and makes the assessment himself and restores the tax and the penalty which has been set aside by the Assistant Commissioner. There is no reason why the assessee in such cases should not be allowed to ask for a reference under clause (2) of section 66. Such an anomaly can be removed only by the Legislature

(1) I. L. R. 5 Pat. 595.
(2) 1. I. T. C. 406.
(3) 1 I. T. C. 221.
(4) 6 Beng. L.R. 592.

amending section 66 of the Income-tax Act so as to include orders passed by the Commissioner of Income-tax under section 33 or by making some other provision which would render the orders of the Income-tax Commissioner, if they are arbitrary and unreasonable, liable to be questioned before a superior authority. As the only question which was referred to us was whether this Court has the right to issue the writ of Mandamus, I would refrain from going into the merits of the present application. In my opinion the application must be dismissed with costs. Hearing fee two hundred rupees.

COURTNEY TERRELL, C. J.:—I agree.

KULWANT SAHAY, J.:—I agree.

JAMES, J.:—I agree.

DHAVLE, J.:—I agree.

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(399) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Jackson and Mr. Niyogi, Additional Judicial Commissioners.

(11th August, 1930).

Jasrup Baijnath Seth .. *Assessee.*

v.

The Commissioner of Income-tax, Central Provinces and Berar .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sec. 4 (2)—Shops in British India and Native States—Loans and repayments inter se—Separate Khatas in names of shops—No entry of remittance of profits in account books—Excess remittances of profits in account books from foreign shops—Assessability.

The assessee with shops in Native States carried on independently of his business in British India, occasionally lent money from his British Indian shops to his shops in Native States, the running account of the loans so advanced from time to time and the amounts received in repayment being entered in separate Khatas in the names of the respective shops. In the year of account, there was no debit in the accounts of the shops in the Native States of any transfer of their profits to British Indian shops, nor credit of their profits in the accounts of the British Indian shops. On an assessment to income-tax on a sum of Rs. 30,709 being the excess of receipts by the British Indian shops over remittances to the Native States shops in the account year,

HELD, that the profits made by the Native States shops being admittedly more than the excess remittances made by those shops, the excess receipts by the British Indian shops were assessable as remittances of foreign profits into British India under Sec. 4 (2) of the Income-tax Act.

Case [Miscellaneous Judicial Case No. 56 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Central Provinces and Berar, for the opinion of the Court.

CASE.

Seth Jasrup Baijnath of Khandwa, hereafter called the assessee, does business in money lending, in the purchase and sale of cotton and in the ginning and pressing of cotton. He has a power house at Khandwa and owns some house property also. He has shops at Harda, Harsud and Kirkiya in the Central Provinces, and at Sanawad, Badwai, Indore and four other unimportant places in the Holkar State, which adjoins the Khandwa District. At these places too business in cotton is done.

2. In his return of income for the year 1928-29 the assessee returned a loss of Rs. 3,929. This return was not accepted as correct and he was asked to produce his accounts which were duly examined. After disallowing certain objectionable items and after adding certain taxable items the Income-tax Officer found the profits of the different shops to be as follows:—

Name of shop.	*Profit.*	*Loss.*
Khandwa	...	21,289
Harsud	277	...
Kirkiya	22,173	...
Harda	...	8,914
Power House	16,517	...
Share profits and losses	629	1,519
Total ...	39,586	31,722
Net profits from business	7,864	
Net income from house property ...	4,823	
Total ...	12,687	

As stated above, the assessee had been doing business in cotton at Sanawad, Badwai and Indore in the Holkar State. Khatas of these shops appear in the account books of the assessee maintained at Khandwa and Harda as shown below:—

Khandwa shop book.

Sanawad Khata.

	Rs.
Credit	14,81,611
Debit	14,68,040
Difference ...	13,571

This refers to the transactions during the year and excludes Havalas and interest with respect to the shops at Indore and Badwai and the old Baki (balance) of Rs. 32,279.

Badwai Khata.

	Rs,
Credit	22,484
Debit	5,934

Difference Rs. 16,545 after excluding the opening balance which was nil and the Havalas which amounted to Rs. 15,976. The net balance remaining was Rs. 479 to which profits at 10 per cent. amounting to Rs. 1,597 on cotton business done to the extent of Rs. 15,976 were added and the total difference is put down at Rs. 2,076.

Indore Khata.

				Rs.
Credit	...	...	...	1.41.003
Debit	...	...	...	1,33,594
Difference	...	...	...	7,409

After taking into account the opening balance of Rs. 3,191 the difference in the year's transaction came to be Rs. 10,602.

The extra receipts on account of the three shops amounted to:—

				Rs.
Sanawad	...	...	...	13,571
Badwai	...	...	..	2,076
Indore	...	...	...	10,602
Total	...			26,249

Similarly in the account books of the shop at Harda, the excess in receipts over remittances made to Sanawad came to Rs. 4,460. Thus the total of the two excess amounts is Rs. 30,709.

The assessee admitted that he made profits in the shops in the Indian State which amounted to more than these excesses. He, however, alleged that he never brought the profits into British India and that the entries in the books of account at Khandwa and Harda were mere ledgers of running account and did not represent the profits brought into British India. As regards his plea that the excesses received in British India were not profits made in the shops in the Indian State and brought into British India, the only evidence tendered by the assessee consisted of the entries in his books of account which, he said, were ledgers. The Income-tax Officer held that these entries did not prove that the excesses were receipts of capital and, in view of the admission of the assessee that he had made profits in the shops in the Indian State amounting to more than the excesses in question, treated them as profits and taxed them under section 4 (2) of the Income-tax Act.

3. The Income-tax Officer computed the total taxable income to be Rs. 1,03,181 and assessed it. An appeal against this assessment was made and the main objection, among others, taken was to the addition of Rs. 30,709. The Assistant Commissioner admitted certain objections of the assessee regarding other items and reduced the assessed income to Rs. 1,01,581 only. As regards the item of Rs. 30,709 he held that the mere entries in the ledgers mentioned above did "not rebut the presumption that the excess receipts are not (sic) on account of profits. I think that the Income-tax Officer was perfectly justified in treating the excess receipts as income derived outside British India and brought into British India. It was clearly taxable under section 4 (2). The action of the Income-tax Officer seems quite justified."

4. The assessee has now presented application under section 66 (2) and has asked that the following points of law be referred to the High Court:—

(1) When the assessee has shops in Native States, namely at Sanawad, Indore and Badwai, and the business of these shops is carried on by the assessee's agents independently of his business in British India and the profits or gains of these shops arising without British India are neither received in nor brought into British India, but when occasionally money is lent by the assessee from his shops in British India to the shops in the Native States, and for this purpose ledgers of their running accounts are kept as Khatas in their names such as, Sanawad Khata, Indore Khata and Badwai Khata, in which an account

is kept of the loans advanced to them from time to time and also of amounts paid by them in payment of these loans from time to time, and also when no debit in the foreign shops is made for transfer of profits to the shop at Khandwa, in British India, nor is there any credit of any such profits in the account books of the shop in British India and the assessee accounts for the excess receipts in his Khandwa shop, (in this case the amount being Rs. 30,709) as being the total amount received from his shops in the Native States in payment of the loans already advanced to them from time to time, can it be presumed, in the face of all these facts which are quite apparent from the account books of the assessee, that the various items making up this amount, are receipts on account of profits and under these circumstances of the case can this amount be considered as received by the assessee on account of "excess profits from Native States," and can they be deemed to have accrued or arisen in British India as profits or gains of the year under assessment. under section 4 (2) of the Income-tax Act?

(2) Under these circumstances of the case, are the Income-tax authorities justified in treating this amount of "excess receipts" as income derived outside British India and brought into British India, and is it taxable under section 4 (2) of the Income-tax Act?

5. OPINION. *Question* (1). This question seems wrongly framed inasmuch as it asserts that "the profits or gains of these shops arising without British India are neither received in nor brought into British India." In fact this is the point at issue. The only point on which the Department and the assessee have disagreed and which arises out of the facts of the case and which should have been (in brief) asked to be referred to the High Court was "Whether the amount of Rs. 30,709 could, in the circumstances of the case, be taxed as income." The facts of the case are sufficiently given above and need not be repeated. It has been already held in *A. V. P. M. R. M. Murugappa Chettiar* v. *The Commissioner of Income-tax, Madras* (1) and in *A. S. P. L. V. R. Ramaswami Chettiar*, v. *The Commissioner of Income-tax* (2) that until the contrary is proved such remittances are presumed to have come out of the profits. I am therefore of opinion that this amount was correctly presumed to have come out of profits and was correctly taxed under section 4 (2) of the Income-tax Act.

Question (2). For reasons given above, I am of opinion that the "excess receipts" were correctly taxed under section 4 (2).

S. B. Gokhale, for the Assessee.

D. N. Chowdhary, for the Crown.

JUDGMENT.

This is a reference under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax on the application of an assessee who stated the questions for reference as follows:—

"1. When the assessee has shops in Native States, namely, at Sanawad, Indore and Badwai, and the business of these shops is carried on by the assessee's agents independently of his business in

(1) 2 I.T.C. 139.
(2) 3 I.T.C. 425.

British India and the profits or gains of these shops arising without British India are neither received in nor brought into British India, but when occasionally money is lent by the assessee from his shops in British India to the shops in the Native States, and for this purpose ledgers of their running accounts are kept as Khatas in their names such as, Sanawad Khata, Indore Khata and Badwai Khata, in which an account is kept of the loans advanced to them from time to time and also of amounts paid by them in payment of these loans from time to time, and also when no debit in the foreign shops is made for transfer of profits to the shop at Khandwa, in British India, nor is there any credit of any such profits in the account books of the shop in British India and the assessee accounts for the excess receipts in his Khandwa shop, (in this case the amount being Rs. 30,709) as being the total amount received from his shop in the Native States in payment of the loans already advanced to them from time to time, can it be presumed, in the face of all these facts which are quite apparent from the account books of the assessee, that the various items making up this amount, are receipts on account of profits and under these circumstances of the case can this amount be considered as received by the assessee on account of 'excess profits from Native States,' and can they be deemed to have accrued or arisen in British India as profits or gains of the year under assessment, under section 4 (2) of the Income-tax Act?

2. Under these circumstances of the case, are the Income-tax authorities justified in treating this amount of 'excess receipts' as income derived outside British India and brought into British India, and is it taxable under section 4 (2) of the Income-tax Act?"

2. There has been a considerable amount of argument before us explaining how the assessee finances his foreign shops and alleging facts somewhat different from those stated in the first question referred. We propose to deal with the case on facts as alleged by the assessee himself; and we cannot consider whether there has been any error in calculating the amount of the excess receipts received from the shops at Sanawad, Indore and Badwai.

3. As regards those facts, the Commissioner has objected only to the statement that the profits or gains of those shops arising without British India are neither received in or brought into British India. As he rightly remarks, that is exactly the point at issue. We propose to state the facts contained in the first question referred little more clearly. They are as follows:—The assessee has shops in Native States, namely at Sanawad, Indore and Badwai and the business of these shops is carried on by the assessee's agents independently of his business in British India. Occasionally money is lent by the assessee from his shops in British India to the shops in the Native States and in this connection ledgers of their running accounts are kept as *Khatas* in their names, *i.e.*, Sanawad *khata*, Indore *khata* and Badwai *khata*, in which an account is kept of the loans advanced to them from time to time and also of amounts paid by them in payment of those loans from time to time. No debit in the foreign shops is made for transfer of profits to the shop at Khandwa in British India, nor is there any credit of any such profits in the account books of the shop in British India; and the assessee accounts for the excess receipts in his Khandwa shop, (in this case the amount being Rs. 30,709) as being the total amount received from his shops in the Native States in payment of the loans already advanced to them from time to time.

4. The question that we have to decide is whether the sum of Rs. 30,709 by which the receipts from the foreign shops exceed the advances made to them is to be treated as income and taxed. The fact that the transactions between the foreign shops and the Khandwa shop are kept separate in the Khandwa shop's accounts and that there is no credit in the Khandwa shop's accounts on account of profits in the transactions with the foreign shops does not, in any way, show that no profits have been received. It is admitted by the assessee that he made profits in the foreign shops of more than the excess receipts found in the *khatas* relating to those shops and it seems reasonable to assume that when the remittances from the foreign shops exceed the advances to them, the excess contained some of those profits. In *Murugappa Chettiar* v. *The Commissioner of Income-tax, Madras* (1) it was held that *prima facie* all remittances from a branch outside British India to the headquarters of a firm in British India are to be regarded as profits and that the burden of proof is cast upon the assessee to show the contrary. In support of this proposition the following quotation was made from Lord Halsbury:—"The next question is whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these two items together, they must include and obviously do include a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all."

5. In view of the above authorities we must hold on the facts of the present case that the excess receipts represent profits until the assessee has proved that some or all of them are not. Reference was made to *Subbiah Iyer* v. *The Commissioner of Income-tax, Madras*, (2) as to how the assessee can discharge the burden upon him. It was there held that the presumption must be taken to have been rebutted where the assessee, who has borrowed monies in British India and carried on a foreign business with such borrowed capital, remits that capital back to British India, and his account books fairly and honestly maintained in the usual course of business show that what he has remitted is capital and not profits. But we cannot say that the assessee's books in the present case show that there was no profit in the sums received by him from the foreign shops. All that is shown is that he received more than what he sent them and that he kept the account of his dealings with them separate from those of his Khandwa shop.

6. As the burden on the assessee has not been discharged our answer to both the questions referred must be in the affirmative.

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(400) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Mr. Justice Carr Offg Chief Justice, Mr. Justice Cunliffe, and Mr. Justice Das.

(2nd September, 1930).

M. K. S. Chettiar Firm .. *Assessees.**

v.

The Commissioner of Income-tax, Burma .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 22 (4), 23 (4), 27 and 30 (1)—Failure to produce accounts—Denial of accounts—Assessment under Sec. 23 (4)—Appeal therefrom, if maintainable—Proper remedy.

* (1931) I. L. R. 8 Rang. 587; A. I. R (1931) Rang. 53.
(1) 2. T. C. 139.
(2) 4 I. T. C. 345.

Where an appeal against an assessment under Sec. 23 (4) of the Income-tax Act for failure to comply with a notice under Sec. 22 (4) for production of account books of a branch business which the assessee denied he kept, was dismissed by the Assistant Commissioner as barred under Sec. 30 (1),

HELD, that no appeal lay to the High Court, the proper remedy being an application to the Income-tax Officer under Sec. 27 though the grounds therefor might have been already urged before the Income-tax Officer and an appeal thereafter in case of an adverse decision.

Case [Civil Reference No. 16 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

At the instance of the M. K. S. Chettiar firm, Pegu, hereinafter referred to as the assessees, the following case is stated to the High Court under the provisions of section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922). The relevant facts of the case are as follows.

2. The assessees are a firm of money-lenders carrying on business at Pegu and Thanatpin with an *ulkadai* (branch) at Tamatake. In connection with their assessment to income-tax for the year 1929-30, the Income-tax Officer issued to the assessees notices under sections 22 (2), 22 (4) and 23 (2) of the Act. These notices, with the exception of one under section 22 (4), were complied with by the assessees. The notice under section 22 (4) which they failed to comply with was issued by the Income-tax Officer on the 19th August, 1929 and required them to produce before him *inter alia* "the Samayal chittai, Silavu chittai, Rokka chittai, Kurippu chittai and Thittam book maintained for the *ulkadai* at Tamatake for the account year Vibhava." None of these chittais and books were produced. The assessees before the Income-tax Officer stated that no such books were kept at Tamatake. The Income-tax Officer held that the assessees had failed to comply with all the terms of the notice in question, and accordingly made the assessment under section 23 (4) of the Act. A copy of the Income-tax Officer's assessment order is attached.

The assessees then preferred an appeal to the Assistant Commissioner of Income-tax under the provisions of section 30 (1). The grounds of appeal briefly were that no separate books of account were maintained at the Tamatake branch, that accordingly there had been no failure on the part of the assessees to comply with all the terms of the notice under section 22 (4) served on them, and that consequently the Income-tax Officer was not justified in law in making the assessment under section 23 (4). A copy of the assessees' appeal is attached. The Assistant Commissioner, after hearing the advocate for the assessees, rejected the appeal *in limine* on the ground that the assessment having been made under section 23 (4) an appeal was barred by the proviso to section 30 (1). He further held that the contention that no separate accounts were maintained at Tamatake should have been raised in an application to the Income-tax Officer under section 27 and that, if the Income-tax Officer's decision thereon was unfavourable to the assessees, they could then have gone to him with an appeal under section 30, and that that was the only way in which he could have considered the question whether or not separate accounts were in fact maintained for the *ulkadai* at Tamatake. A copy of the Assistant Commissioner's order is attached.

The assessees are in disagreement with the Assistant Commissioner's interpretation of the provisions of section 27, section 30 (1) and the proviso to section 30 (1). In their application for reference to the High Court they propounded three questions which they alleged were questions of law arising out of the Assistant Commissioner's order. But after discussion with their advocate it has been decided that one question alone will cover all the ground in dispute and this question is as follows:—

"In the circumstances of this case, does the assessees' remedy lie in a direct appeal to the Assistant Commissioner under section 30 (1) of the Income-tax Act, or in an application to the Income-tax Officer under section 27 of the said Act?"

The above is therefore the question which I refer to the High Court.

3. My opinion on this question is that the only remedy open to the assessee against whom an assessment has been made under section 23 (4) is to ask for the assessment to be re-opened under section 27.

F. S. Doctor, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

CARR, OFFG. C. J.:—This is a reference by the Commissioner of Income-tax under section 66 (2) of the Income-tax Act. The facts are very simple.

The respondents, the M. K. S. Chettiar firm, carry on business in the Pegu District and have a branch at Tamatake. In connection with the assessment of income-tax the Income-tax Officer issued to them a notice under section 22 (4) of the Act calling upon them to produce the books of the Tamatake branch. These books were not produced and the assessees stated before the Income-tax Officer that they kept no books at that branch. The Income-tax Officer did not believe the statement and in his order gave reasons for supposing that books must be maintained at Tamatake. He held therefore that the assessees had failed to comply with all the terms of the notice under section 22 (4) and made the assessment under section 23 (4) of the Act.

The assessees then filed an appeal before the Assistant Commissioner, who dismissed it on the ground that under the proviso to section 30 (1) of the Act the appeal was barred. He held that the proper remedy for the appellant was to have made an application to the Income-tax Officer under section 27 of the Act and in the event of that application being refused then to have filed an appeal.

The question referred is:—"In the circumstances of this case, does the assessees' remedy lie in a direct appeal to the Assistant Commissioner under section 30 (1) of the Income-tax Act, or in an application to the Income-tax Officer under section 27 of the said Act?"

I have no doubt whatever that the Assistant Commisioner was right in holding that no appeal lay. The proposition put forward by the learned advocate for the respondents is, I think, entirely unsustainable. The proviso to section 30 (1) of the Act is very clear and definite. The whole argument is that the respondents in fact had no such books as those called for and therefore in not producing them they were not failing to comply with the notice. The question whether the assessees had or had not in fact such books was a question

of fact for the decision of the Income-tax Officer. He decided that the assessees had such books and that therefore the assessees had failed to comply with the terms of the notice. That was a decision entirely within his jurisdiction and on that decision he acted quite properly in making the assessment under section 23 (4). In effect the respondents' contention is that merely because they said that they had no such books therefore the Income-tax Officer could not make the assessment under section 23 (4). The effect of this argument carried to its logical conclusion would be that in every case in which non-compliance wih the terms of the notice was not admitted, the Income-tax Officer would be debarred from making the assessment under section 23 (4). This conclusion is clearly not justified by anything in the Act itself and I can see no reason whatever for holding that the proviso to section 30 (1) does not apply in this case. In my opinion it clearly does apply and the appeal was barred. The fact that an application under section 27 would have had to be based on grounds which had already been urged by the respondents before the Income-tax Officer would not, I think, be any bar in making such an application. My opinion therefore is that the respondents' proper remedy was to have made an application under section 27 and thereafter if the decision were against them to have appealed.

I would answer the reference accordingly and direct the respondents to pay the costs of the Commissioner of Income-tax, three gold mohurs.

CUNLIFFE, J.:—I concur.

DAS, J.:—I concur.

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(401) IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir John Beaumont Kt., Chief Justice and Mr. Justice Blackwell.

(30th September, 1930).

The Indian Life Assurance Co., Ltd. .. *Assessees.**

v.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 66—Specific Relief Act. Sec. 45—Assessment by the Income-tax Officer, Karachi—Review of assessment by Commissioner in Bombay—Application to Bombay High Court for reference—Sind Court competent to hear the case—Discretion to order reference.

Where an assessment made by the Income-tax Officer, Karachi, was reviewed by the Commissioner of Income-tax, Bombay, under Sec. 33 of the Income-tax Act by disallowing the claim for depreciation which had been granted by the Income-tax Officer, Karachi and the assessee, a Life Assurance Co., with registered office in Karachi, on the refusal of the Commissioner to state a case for the opinion of the High Court applied to the High Court of Bombay under Sec. 45 of the Specific Relief Act to direct the Commissioner to state a case,

HELD, that the Court of Judicial Commisioner in Sind and not the High Court, Bombay was the High Court within the meaning of Sec. 66 of the Income-tax Act to deal with the case to be stated and consequently it would not be right in the exercise of discretion to make an order under Sec. 45 of the Specific Relief Act.

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* (19 1) 33 Bom. L. R. 19 ; A. I. R (1931) Bom. 150.

Application under Sec. 45 of the Specific Relief Act and the Indian Income-tax Act for an order to direct the Commissioner of Income-tax, Bombay, to state a case for the opinion of the High Court.

Coltman, for the Assessees.

The Advocate General, for the Crown.

JUDGMENT.

BEAUMONT, C. J.:—This is a petition under section 45 of the Specific Relief Act by a company called the Indian Life Assurance Company which is a company registered under the Indian Companies Act and having its registered office at Karachi. The petitioners were assessed to income-tax for the year 1928-29 by the Income-tax Officer at Karachi, and in that assessment the petitioners were allowed a deduction of Rs. 74,000 odd in respect of depreciation of immovable properties owned by the Petitioners, and they paid their income-tax less that deduction.

The respondent, who is the Commissioner of Income-tax for the Presidency of Bombay including the Province of Sind disagreed with the deduction which the petitioners had been allowed and, acting under the power conferred upon him by section 33 of the Income-tax Act, he disallowed the petitioners' claim for that deduction, and, I suppose, made a fresh assessment upon them. The petitioners were dissatisfied with the order of the Commissioner and they requested him to state a case for the opinion of the Court. The Commissioner refused to do that as he thought that the matter was quite clear, and thereupon the Petitioners presented this petition in which they ask for an order requiring the respondent to draw up a statement of the Petitioners' case and to refer it with his opinion thereon to this Court.

The Advocate General for the respondent has taken a preliminary objection that this Court would have no jurisdiction to deal with the case if stated.

Mr. Coltman for the petitioners argues that, even if that is so, we can under section 45 of the Specific Relief Act require the Commissioner of Income-tax Bombay, who is a public officer resident in Bombay, to state a case. But, in my opinion if we are satisfied that the case when stated would have to be referred to the Court of the Judicial Commissioner in Sind for decision, it would not be right for us in our discretion to make an order under section 45 of the Specific Relief Act even if we have power to do so. It is necessary therefore to determine whether this Court would have jurisdiction to hear the case if stated.

Section 66 of the Income-tax Act provides:—"If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII a question of law arises, the Commissioner may, either on his own motion or on reference from any income tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

The Advocate General says that the "High Court" in that section for the purpose of the present case is the Court of the Judicial Commissioner in Sind and not the High Court of Bombay. The expression 'High Court' is defined in section 3 (24) of the General Clauses Act in these terms:—"High Court," used with reference to civil proceedings, shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates."

Under section 1 of the Sind Court Act, Bombay Act XII of 1866, it is provided:—"There shall be for the Province of Sind a Court of the Judicial Commissioner of Sind (hereinafter called the Court of the Judicial Commissioner) which shall be the highest Court of Appeal in civil and criminal matters in the said Province and which shall be the District Court and Court of Session of Karachi....." And then by section 1 of the Government of India Act V of 1872 it is provided "The High Court of Bombay has not and shall be deemed never to have had jurisdiction over the Province of Sind." So that, within the province of Sind, the Court of the Judicial Commissioner is clearly the High Court. On the other hand, within the whole of the Presidency of Bombay, which of course for certain purposes includes the province of Sind, the High Court of Bombay is the High Court, and the question is, which Court is the High Court for the purpose of section 66 of the Income-tax Act, and it seems to me that in determining that question what we have to see is in which place does the Income-tax Act for the purpose of this proceeding operate. The Act under section 1 operates in the whole of British India, but it seems to me that for the purpose of the present provision it operates in Sind and not in Bombay. The assessment was originally made in Sind and the assessee has its registered office in Sind. No doubt the assessment was actually altered by the Commissioner at his office in Bombay, but the altered assessment operates in Sind, and the money will have to be paid or collected in Sind.

It seems to me therefore that for the purpose of the Income-tax Act this assessment operates in Sind and that therefore the Court of the Judicial Commissioner in Sind is the High Court within the meaning of section 66 (1). Our decision on this point is in accordance with a decision which has already been given on the same point by the Court of the Judicial Commissioner at Sind in Miscellaneous Application No. 23 of 1929—*Bulchand Keshavdas* v. *The Commissioner of Income-tax, Bombay.*

In my judgment, therefore, this petition must be refused with costs.

BLACKWELL, J.:—I agree.

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(402) IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir John Beaumont Kt., Chief Justice and Mr. Justice Barlee.

(3rd October, 1930).

Ellis C. Reid, Administrator in India of the Estate of Sir Henry Proctor, deceased .. *Assessee.**

v.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 22 (2) and 23 (4)—Notice to submit return, Non-compliance of—Death after period specified in notice—Assessment under Sec. 23 (4) after death. If legal.

Where a person served with a notice under Sec. 22 (2) of the Income-tax Act failed to make a return and died after expiration of the period specified in the notice, an assessment under Sec. 23 (4) cannot be made on him after his death.

* (1931) 55 Bom. 312; 33 Bom. L. R. 388; A. I. R. (1931) Bom. 333.

Case [Civil Reference No. 7 of 1929] stated under Sec. 66 (1) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Bombay for the opinion of the High Court.

CASE.

Under the authority vested in me under section 66 (1) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as the 'Act'), I have the honour to refer for your Lordships' decision the questions of law categorically set out in para 10 below arising out of the income-tax and super-tax assessment of the late Sir H. E. Proctor (hereinafter referred to as the "assessee") for the year 1928-29.

2. *Facts of the case.*—For the purposes of assessment to income-tax and super-tax for the year 1928-29, the Senior Income-tax Officer, Bombay, issued on 13th April, 1928 the usual notice under section 22 (2) of the Act calling upon the assessee to put in his return of income. This notice was delivered to Messrs. Killick Nixon & Co., of which firm the assessee was at one time a partner and seems to have reached the assessee in England on or about 25th May 1928. The notice required the assessee to deliver a true and correct statement of his total income within 30 days from the receipt of the notice. No return of income was, however, ever made out and the assessee died on 11th July 1928. This information was conveyed in Messrs. Killick Nixon & Co.'s letter to the Senior Income-tax Officer, on 24th August 1928 and after some enquiries the Senior Income-tax Officer, on 27th November 1928, sent a form of return of income to Messrs. E. C. Reid and R. C. Lowndes who had informed him that the executor in England had sent them a Power-of-Attorney for the purpose of taking out Letters of Administration to the estate in India. The Senior Income-tax Officer's letter requested them to return the form duly completed showing income from investments, etc., accrued to the assessee during the year ended 31st March 1928.

3. On 27th December, the form of return of income was returned signed by Mr. E. C. Reid as "Administrator to the estate of Sir H. E. Proctor deceased" and showing a total income of Rs. 1,27,616. On 5th January 1929, the Senior Income-tax Officer made an assessment order accepting the return and income-tax was levied on Rs. 52,959 and super-tax on Rs. 77,616 under section 23 (1) of the Act.

4. On 4th February 1929, Messrs. Little & Co., Solicitors for the Administrator of the Estate wrote to the Senior Income-tax Officer contending that the estate of the deceased assessee was not liable for either income-tax or super-tax for the year in question as no assessment was made during the life-time of the deceased. Thereupon, the Senior Income-tax Officer gave an interview to the Solicitors on 9th February and after hearing them passed an order on the same day in the following terms:—"In this case the party died after the return was due. The party has therefore to be assessed under section 23 (4). From the information supplied by the Administrators the income is ascertained to be as under:—

	Rs.
Income to be assessed to I. T. ..	52,959
Income to be assessed to S. T. ..	77,616

Issue notices accordingly section 23 (4) for 1928-29."

A copy of the proceedings before the Senior Income-tax Officer is hereto annexed and marked Exhibit A.*

* Not Printed.

5. By letter dated 25th February 1929 addressed to the Administrator of the Estate, the Senior Income-tax Officer confirming the interview with the Solicitors on the 9th February, forwarded income-tax and super-tax notices and requested payment on or before the 15th March 1929.

6. Mr. E. C. Reid the Administrator in India of the estate of the deceased assessee, by petition dated 23rd March 1929 addressed to the Assistant Commissioner appealed under section 30 of the Act against this assessment. Copy of the petition is hereto annexed and marked Exhibit B.* As the assessment was under section 23 (4) of the Act, no appeal lay but this provision was lost sight of and the petition was accepted and the appeal was heard by the Assistant Commissioner of Income-tax on the 22nd April 1929 and the assessment was confirmed. A copy of the Appellate Order and the reasons therefor given by the Assistant Commissioner is hereto annexed and marked Exhibit C.*

7. Messrs. Little & Co., on behalf of the Administrator in India ,then addressed a letter dated the 15th May 1929 to the Commissioner contending that as the assessee died on 11th July 1928 and as he was not assessed before his death, neither he nor his estate could in any event be assessed under the Act and that the assessment made under section 23 (4) of the Act was under the circumstances illegal and invalid. They further submitted therein that there was no provision in the Indian law for the assessment of a deceased person and requested me to refer the case to the High Court. A copy of this letter is hereto annexed and marked Exhibit D.*

8. The assessment being under section 23 (4) of the Act, no appeal lies under the proviso to section 30 (1) of the Act. Hence the assessee was not in a position to require a reference under section 66 (2) of the Act as this only lies on points of law arising out of an appellate decision under section 31 or 32 of the Act. The decision passed by the Assistant Commissioner being *ultra vires* has been quashed by me under section 33 of the Act after giving due notice to the Solicitors by my letter dated the 3rd July 1929 a copy whereof is hereto annexed and marked Exhibit E.*

9. The assessee being dead and there being no authority for me to submit a reference under section 66 (2) of the Act, I have the honour to submit this reference under section 66 (1) of the Act which gives me that authority. I therefore request your Lordships to consider the facts of the case and decide the questions set out in the next paragraph.

10. *Questions for decision of the High Court.*—(1) The assessee having failed to make a return of income under section 22 (2) of the Act, was it legal for the Senior Income-tax Officer to make an assessment under section 23 (4) of the Act after the assessee's death?

(2) In case the above assessment was legal, could the demand notice under section 29 of the Act in respect of the assessment made be served on the administrator of the estate of the deceased and the tax recovered from the estate by coercive process under section 46 of the Act?

11. *Opinion of the Commissioner.*—As section 66 (1) of the Act requires me to give my opinion while forwarding the reference, I beg to state as under:—

Question (1).—Section 23 (4) of the Act states distinctly that if a "person fails to make a return under sub-section (1) or sub-section (2) of section 22.....the Income-tax Officer *shall* make the assessment to the best

* Not Printed.

of his judgment." Hence if a person fails to make a return, it is incumbent on the Income-tax Officer to make an assessment. The law gives the Income-tax Officer no option in the matter. In this case the assessee was required to make a return on or before 25th June 1928. As he was alive upto and after that day, he was not required to do an impossible thing. He failed to do what he could have done and the Income-tax Officer was therefore bound to make an assessment under section 23 (4). In making an assessment under section 23 (4), the question whether the assessee is dead or alive does not arise as it is to be made by the Income-tax Officer to the best of his judgment without any help or guidance from the assessee.

Question (2).—An 'assessee' is defined in section 2 (2) as "a person by whom income-tax is payable" and the Chief Justice and Justice Raja of the Chief Court of Oudh have in the case of *Govind Saran and another* v. *The Income-tax Commissioner, U. P.* (1) stated as under in this connection:—"As far as we can gather it would be difficult from the definition of "assessee" to exclude the representatives of the estate responsible for the payment of income-tax."

I am inclined to agree respectfully with the said learned Judges. It can be said that because in the case of a deceased person, his estate has to bear all charges incurred by him, the estate is the person by whom tax is payable on the death of the assessee and hence the demand notice can be served on the administrator as representing the estate and further action taken under section 46.

12. Though the assessee is dead, the administrator of his estate is interested in these proceedings and hence due notice of the hearing of the Reference may kindly be given to his Solicitors, Messrs. Little & Company.

13. A copy of your Lordships' decision may kindly be certified to me for further action as required by section 66 (5) of the Act.

Sir Dinsha F. Mulla with *Messrs. Little and Company*, for the Assessee.

The Advocate General with the *Government Solicitor*, for the Crown.

JUDGMENT.

BEAUMONT, C. J.:—This is a reference under section 66 (1) of the Income-tax Act in which the Commissioner asks two questions: first, the assessee having failed to make a return of income under section 22 (2) of the Act was it legal for the senior Income-tax Officer to make an assessment under section 23 (4) of the Act after the assessee's death, and secondly, in case the above assessment was legal, could the demand notice under section 29 of the Act in respect of the assessment made be served on the Administrator of the estate of the deceased and the tax recovered from the estate by coercive process under section 46 of the Act?

The facts are not in dispute, and can be stated quite shortly. On the 13th April 1928 a notice was issued under section 22 (2) of the Act requiring Sir Henry Proctor to make a return for income-tax. Sir Henry was in England and the notice reached him on the 25th May 1928, and he had 30 days from that date in which to comply with the notice. On the 11th July, *i.e.*, after the expiration of the 30 days, he died. Mr. Reid was subsequently given a power of attorney in India by the executors or administrators of the estate, and on the 27th November Mr. Reid, under his power of attorney, made a return for income-tax. On the 28th December letters of administration in India were taken out by

(1) 2 I. T. C. 480.

Mr. Reid. On the 5th January 1929, the Income-tax Officer made an assessment on Mr. Reid as administrator. The Officer then had some correspondence and an interview with Messrs. Little and Company who were acting as solicitors for the estate, and as a result of that correspondance and the interview, the Income-tax Officer annulled his original assessment under section 23 (1) of the Act and proceeded to make an assessment on the deceased under section 23 (4). From that order there was an appeal to the Assistant Commissioner and the appeal was dismissed. The matter then came before the Income-tax Commissioner who took the view that the proceedings had been somewhat irregular. He pointed out that there was no appeal from an assessment under section 23 (4) and therefore the proceedings before the Assistant Commissioner were irregular; he also took the view that the Income-tax Officer could not vary his own order and was bound by his first assessment which was made on the estate and the Income-tax Commissioner thereupon, under the powers conferred upon him by section 33 of the Act, quashed the appellate proceedings and the second order made by the Income-tax Officer and varied the first order by treating it as an assessment under section 23 (4). So that the position is that the deceased, and not in terms his administrator, has been assessed under section 23 (4) and the question is whether the assessment is legal.

The question mainly turns, I think, on the construction of sections 23 and 29 of the Income-tax Act, but one has to look at certain other provisions of the Act in order to understand those sections.

The first thing to notice is the definition of 'assessee' contained in section 2 (2) of the Act. That definition reads " 'assessee' means a person by whom income-tax is payable." It is clear that that definition in terms only applies to a living person, the words being "a person by whom income-tax is payable" and not "a person by whom or by whose estate income-tax is payable."

Then, section 3 is the charging section and provides:—"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals." There appears to be nothing in that charging section to suggest that a man who has once become liable to tax can avoid payment by dying, and I must confess that I do not myself see any intelligible reason why when tax is once charged upon a subject in respect of a period during which he was alive and enjoying the benefits of the proceeds of taxation, he should escape liability by dying before the tax has been assessed or paid. But one has to look at the rest of the Act to see whether there are any appropriate provisions for collecting tax from the estate of a deceased person. I think there is nothing else material in the Act till one comes to sections 22 and 23 which are the sections dealing with the procedure for assessment.

Section 22 (2) provides:—"In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form." That is the section under which notice was served on Sir Henry Proctor. Then sub-section (4) provides "that the Income-tax Officer may serve on any person upon whom a notice has been served under sub-section (2) a notice requiring him, to produce, or cause to be produced, such accounts or documents" as the Officer may require.

Then comes section 23 which is the section under which the assessment has to be made. The first sub-section provides:—"If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return." Then, sub-section (2) enables the Income-tax Officer to require the person who has made the return to produce evidence in support of his figures. And sub-section 3 provides for an assessment in a case falling within sub-section (2), and enables the Income-tax Officer when he has accepted the figures of the assessee upon such evidence as may be produced to assess the total income of the assessee.

Then, sub-section (4) contains the provision under which, it is suggested, an assessment can be made in this case. That provides that if the person who is liable for the tax fails to make a return under section 22 (2), or fails to comply with a notice under section 22 (4) to produce his accounts and documents, or fails to comply with the terms of a notice under section 23 (2) to produce further evidence, in all of which cases the person liable is in default, then the Income-tax Officer shall make the assessment to the best of his judgment.

Now, it is to be noted that the words there are "shall make the assessment' and not "shall make an assessment," and the use of the definite pronoun seems to me to refer back to sub-sections (1) and (3) of section 23, that is to say, the assessment must be on the total income of the assessee. Having regard to the definition of 'assessee' as being a person who is liable to pay income-tax, the word is not appropriate to a dead man, so that if an assessment is to be made on a dead man, as was done here, under section 23 (4), some violence must be done to the language of the section.

Then, the next material section is section 27, which confers on the person upon whom an assessment is made under section 23 (4), *i.e.*, a person who is in default either in making his original return, or in supplying the Officer with the documents or evidence which he has required, the right to satisfy the Income-tax Officer that he had a reasonable cause for the default, and in that case the Income-tax Officer may make a fresh assessment.

Now, that section confers a very valuable privilege upon a person assessed under section 23 (4), because that assessment is an *ex parte* assessment, from which there is no appeal (see section 30). Sir Dinshah Mulla points out that if a dead person can be assessed under section 23 (4), it is difficult to see how his estate can get the benefit of section 27 because the section in terms only deals with the person upon whom the assessment has been made.

Then, you come to section 29, which is a very material section, under which payment can be demanded, and it provides "When the Income-tax Officer has determined a sum to be payable by an assessee under section 23, or when an order has been passed under sub-section (2) of section 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable." Well, it is quite clear that in this case if the Government is right the word "assessee" as used in the first part of that section "a sum to be payable by an assessee under section 23" must be the deceased person Sir H. Proctor and it is equally clear that the second use of the word 'assessee' in the sentence "the Income-tax Officer shall serve on the assessee a notice of demand," must refer to the administrator or personal representative of the deceased person, so that one is compelled to give to the word 'assessee' different meanings in different parts of the same section.

Then the only other section one has to notice is section 45, which provides that any amount specified as payable in a notice of demand shall be paid within the time, and at the place mentioned in the notice; so that the demand for payment is limited by the notice.

These are, I think, the only material provisions of the Act. It is to be noticed that there is throughout the Act no reference to the decease of a person on whom the tax has been originally charged, and it is very difficult to suppose the omission to have been unintentional. It must have been present to the mind of the Legislature that whatever privileges the payment of income-tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and, in practically every case, before the last instalment has been collected, and the Legislature has not chosen to make any provisions expressly dealing with assessment of, or recovering payment from, the estate of a deceased person. In order that the Government may succeed and the assessment made in this case may be held legal, I think, one must do a certain amount of violence to the language of section 23 (4); I think one must either do a certain amount of violence—I should say a considerable amount of violence—to the language of section 27, or else hold that the privilege conferred on a living person assessed under section 23 (4) of getting the assessment set aside is not to be enjoyed by the estate of a deceased person—a distinction for which I can see no logical reason. One must also construe section 29 so as to give to the word 'assessee' one meaning in one place and another meaning in another place.

In my judgment, in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the Legislature intends to assess the estate of a deceased person to tax charged on the deceased in his life time the Legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the statute. We are not concerned wih the case which may arise of the death of a person after assessment but before payment.

In my judgment, therefore, the first question must be answered in the negative, and in that case the second question does not arise.

BARLEE, J.:—I agree with his Lordship the Chief Justice that the answers to the questions propounded by the Income-tax Commissioner must be in the negative.

It is quite clear that the Act does not in express terms provide for the collection of income-tax, due on the income of a deceased person, from his estate in the hands of his legal representatives. The word used in all the operative sections is 'assessee,' the person by whom the income-tax is payable, and section 3 shows that the assessee is the person who has earned the income. Section 23 (1) speaks of the 'total income of the assessee' and sub-section (4) empowers the Income-tax Officer to make the assessment, *i.e.*, an assessment on the total income of the assessee. Section 27 gives the assessee power to ask for a review of assessment in case it has been made *ex parte* under section 23 (4) and section 29 speaks of the sum payable by an assessee.

In fact it seems perfectly clear that the situation which has arisen in this case was not provided for by the Legislature in express terms.

We are asked to hold, in fact, that when the Legislature speaks of an assessee, it impliedly meant an assessee or in the case of his death his legal representative. We have to find some principle by which this interpretation can be justified. The Commissioner relies on section 23 (4). His argument is

that inasmuch as this sub-section imposes a duty on the Income-tax Officer to make an assessment in the case of any one who has failed within a specified time to furnish the statutory return, the Income-tax Officer was in this case justified in assessing the income-tax on the income of the deceased. His argument, I think, runs in a circle. Assuming that it is his duty to prepare a document showing what income-tax is recoverable on the basis of his enquiries, that 'assessment' cannot have any legal effect unles it is one on the income of the assessee, who under the strict interpretation of the Act is a living person. So even in cases under section 23 (4) it has to be decided whether an assessee includes his legal representative. It must be remembered, too, that section 23 (4) has to be read with section 27. In the present case, it is possible that Sir Henry Proctor, had he lived, would have had a good excuse for not furnishing the return which he was required to make, and in that case he would have been entitled to ask the Income-tax Officer to review the assessment. The question then arises whether his legal representatives had or had not that right. In a word, if the word 'assessee' is to be interpreted widely to include a legal representative in section 23 (4), it must be interpreted in the same way throughout.

What we have to find is a rule which is applicable to all cases of this nature. It does not seem to make any difference whether the assessee dies on the 1st January, before he has been served with a notice or after he has been served with a notice and has failed to furnish a return. It is not likely that the Legislature has impliedly authorised the determination of this question on the basis of the stage at which the proceedings have reached. All persons who lived till the 1st October are in the same category. They are persons who have earned income in the previous 12 months and should be treated alike. Practically we have to decide whether we can read into the Income-tax Act by implication the rule which is expressed in the English Act and in section 146 of the Civil Procedure Code, that, where any proceedings may be taken or application made by or against any person, then the proceedings may be taken, or the application may be made by, or against any person claiming under him, *i.e.* by his legal representative.

The best that can be said for the Crown is, as I have said, that on the 1st April every subject is potentially liable to pay income-tax on his income on the previous twelve months, or to show that his income is below taxable limits. The claim of the Crown is a money one against his estate and does not resemble damages in a personal action; and it may be argued that in equity there can be no reason why the well known rule of interpretation, which has been adopted, as I have said, in special Acts, should not be used on behalf of the Crown to enable them to recover what may be called just dues. There is a good deal to be said for this view, but I do not think it can be adopted in this case. It is stated in Maxwell's Interpretation of Statutes that fiscal statutes must be interpreted strictly in favour of the subject, and I take that to mean that the treasury cannot tax without the express permission of the Legislature. This being so, the Commissioner must fail in this case, since undoubtedly there is no express permission in the Act to recover the tax from the estate of the deceased. Further the rules of this Act are not rules of procedure to be interpreted by Civil Courts, but are more in the nature of rules for the guidance of fiscal Officers, and it seems to me that such rules are intended by the Legislature to be interpreted according to their plain meaning and that they must not be stretched by judicial interpretation.

PER CURIUM:—No order as to costs.

(403) IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir John Beaumont Kt., Chief Justice and Mr. Justice Barlee.

(3rd October, 1930).

Messrs. (Sir) Sarupchand Hukamchand .. *Assessees.**

v.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 4 (1)—Assessees appointed Agent of Mills in Indore—Agent entitled to commission on sale of Mill goods—Mill shop opened in Bombay and goods sold there—Sale proceeds sent to Indore and commission paid there—Commission earned, if assessable.

Under an agreement made in Indore, the assessees were appointed Secretaries, Treasurers and Agents of Hukumchand Mills Co., Ltd., a company registered at Indore. Under this agreement the assessees inter alia were to open and maintain at the Mills' expense shops in Bombay and elsewhere for the sale of the Mills goods, to keep the books of account in Indore in respect of all sale proceeds and disbursements, etc., of the Mills, to charge a commission of 1¼ per cent on the gross sale proceeds of all cloth and yarn produced by the Mills and to pay themselves out of the moneys of the Mills all sums due to them by way of commission or otherwise.

On an assessment levied on the commission earned by the assessees on the sales of cloth effected by the shop in Bombay opened in the name of the Mills and managed by them in accordance with the provisions in the agreement, the assessees contended that as the sale proceeds of the Bombay shop were all sent to Indore and the commission paid there, no income accrued or arose in British India.

HELD, that the income assessed being commission upon sales made in Bombay accrued or arose in Bombay within the meaning of Sec. 4 (1) of the Income-tax Act though the right to it arose under an agreement made in Indore and as a matter of practice payment was made there.

Case [Civil Reference No. 9 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, (hereinafter referred to as "the Act") and at the instance of Messrs. Sir Sarupchand Hukumchand (hereinafter referred to as "the assessees"), I have the honour to refer for your Lordships' decision the question of law set out in para 12 below which has arisen out of the income-tax and super-tax assessments of the assessees for the financial year 1928-29. This question as well as the facts of the case enumerated below have been approved by the assessees' Solicitors, Messrs. Mulla and Mulla.

2. *Facts of the case*:—The assessees are a firm carrying on business in Bombay, Calcutta, Indore and other places in India. They own immoveable properties in Bombay and Poona and pay income-tax and super-tax at Bombay in respect of their income liable to tax. The assessees amongst their other numerous activities are the Secretaries, Treasurers and Agents of the Hukumchand Mills, Ltd., (hereinafter referred to as "the Company"), a Company registered at Indore (a Native State) where the mill premises and

* 33 Bom. L. R. 328 ; A. I. R. (1931) Bom. 236.

offices are situated and the assessees' business as such Secretaries, Treasurers and Agent is conducted by their office at Indore. The terms under which the assessees act as the Agents of the Company are evidenced by an agreement dated 16th May 1915 made between the Company and the assessees at Indore as subsequently modified by a resolution of the shareholders of the Company dated 24th May 1922 made at Indore. Copies of the above agency agreement and of the resolution are attached hereto and collectively marked as Exhibit A.*

3. By clause 6 of the said agreement Exhibit A, it is provided that the Company shall defray the expences of maintaining offices at Indore and at Bombay, if necessary, to transact the business of the assessees as Secretaries, Treasurers and Agents of the Company or shall pay a fixed monthly allowance for the purpose.

4. Clause 10 of the said Agreement is as :—"The said firm shall at any time hereafter, upon the request in writing of the Directors for the time being of the said Company but at the sole costs and charges of the said Company, open and maintain in Indore or|and Bombay or|and elsewhere (so long as the said Directors shall not by notice in writing require them to close the same but no longer) a shop suitable for the sale by retail of the cloth and yarn manufactured at the said Company's Mill and shall from time to-time out of the cloth and yarn manufactured at the said Company's Mills, supply the said shop with so much cloth and yarn as there shall be a demand for. The said firm shall, with the assistance of the Directors, have the general management of the said shop and of the business transacted therein and the engagement and discharge of all clerks and servants required in the said shop. The salaries of all such clerks and servants shall be paid by the said Company."

5. Paragraphs 3 and 4 of the agreement, Exhibit A, deal with the remuneration to be paid to the assessees for the services rendered by them as Secretaries, Treasures and Agents of the Company. Para 4 deals specially with the remuneration payable to the assessees in consideration of the services rendered as the selling agents of the Company. As subsequently modified, these two paragraphs provide that a commission at the rate of 16 per cent on the annual profits of the Company be paid to the assessees and that a further commission at 1¼ per cent on the gross sale proceeds of all cloth produced by the Mill be paid to the assessees for services as the selling agents of the Company.

6. The Company have opened a shop at Bombay at 36, Chauk, Mulji Jetha Market styled "the Hukumchand Mills Ltd. Cloth Shop" for the sale of cloth and yarn produced by the Company's Mills at Indore. This shop is maintained by the assessees at the expense of the Company in accordance with the terms of the agreement and is managed by them with the assistance of the Directors of the Company. The staff of the shop consists of a salesman, a head clerk and a cashier appointed by the assessees in consultation with the said Directors. Cloth and yarn are supplied from the Indore Mills for sale at this shop at Bombay. During the accounting period pertaining to this assessment, the sales at this Bombay shop amounted to Rs. 27,72,700. 1¼ per cent on these sales amounted to Rs. 34,658-12-0 and the total remuneration paid to the assessees by the Company was Rs. 1,55,589 arrived at as under:—

	Rs.
At 16 per cent. on profits of the Company for the calendar year 1926	86,272
At 1¼ per cent. on sales of cloth and yarn at Bombay as well as outside British India ...	69,317
Total ...	1,55,589

* Not Printed.

7. For the financial year 1928-29, the Income-tax Officer, Special Circle, Bombay, assessed the total income of the assessees from all sources at Rs. 4,93,788; a copy of the assessment form dated 26th June 1929 is hereto annexed as Exhibit B.* It does not appear necessary for the purposes of this Reference to refer in detail to the Income-tax Officer's order which is dated 13th June 1929. The income included a sum of Rs. 77,794 which represented 50 per cent of the total commission received by the assessees from the Company as its Secretaries, Treasurers and Agents as follows:—

			Rs.
Commission on profit	...	...	86,272
Commission on sales of cloth and yarn		..	69,317
Total	...		1,55,589

and the Income-tax Officer has in this connection noted as follows:—"As this Mill has selling agency in British India at 36,Couk M. J. Market and as 50 per cent of the net profits (after allowing the above commission of Rs. 1,55,589) have been taxed in British India as profits earned on sales made in British India or rather business done in British India I take, 50 per cent. of Rs. 1,55,589 as commission earned in British India on the same basis and for the same reasons as 50 per cent. profits taxed in British India.....Rs. 77,794."

8. The assessees objected to being taxed on this amount on the ground that no part of the remuneration received by them from the Company represented income, profits or gains accruing, arising or received in British India and appealed against the Income-tax Officer's order to the Assistant Commissioner of Income-tax, 'A' Division, Bombay, in respect of this and several other items with which latter items, however, this Reference is not concerned. A copy of the appeal petition dated 11th July 1929 is annexed hereto and marked Exhibit C.*

9. The Assistant Commissioner heard and disposed of the appeal on the 7th April 1929. The item with which this Reference is concerned is treated as contention (d) by the Assistant Commissioner and a copy of his order under item (d) is hereto annexed and marked Exhibit D.* The rest of the Assistant Commissioner's order deals with items pertaining to other businesses of the assessees and therefore an extract only of the material portion of his order is annexed and exhibited hereto. The Assistant Commissioner held as far as the above amount was concerned that the assessees were rightly taxed.

10. Not satisfied with this decision, the assessees submitted to me a petition dated 5th September 1929 requesting me to revise the orders passed by the Assistant Commissioner and the Income-tax Officer and in case I was not inclined to do so they requested that I should refer the case under section 66 (2) of the Act to the High Court. A copy of the said petition dated 5th September 1929 including the grounds of revision but omitting Exhibit A thereto which is a copy of Exhibit D hereto is annexed hereto and marked Exhibit E.*

11. After hearing the assessees' Solicitor upon the said Petition, as I am not prepared to amend the orders passed by the Income-tax Officer and the Assistant Commisioner as prayed for therein except to the extent indicated in my opinion in paragraph 13 below, I submit this Reference for your Lordships' decision on the question set out in the next paragraph.

* Not printed.

12. *Question for decision.*—The question to be decided by your Lordships is as under as agreed to by the assessees' Solicitors, Messrs. Mulla and Mulla:—"Whether the remuneration or a part thereof (and if a part thereof which part) earned by the assessees as the Secretaries, Treasurers and Agents of the Company under the terms of the agreement Exhibit A is liable to be assessed for payment of income-tax and super-tax in British India."

13. *Opinion of the Commissioner.*—As section 66 (2) of the Act requires that the Commisioner should give his opinion while forwarding a Reference to the High Court, I beg to add that I am of opinion that the remuneration earned at 1¼ per cent. on the gross sales in the Bombay shop is alone liable to assessment and that tax is leviable on Rs. 34,658 received by the assessees as remuneration as selling agents of the Company with respect to its shop in Bombay. If your Lordships so please, the question for decision by the High Court may be confined to the question of the liability of this amount only. I had informed the assessees' Solicitors that I could give them relief under section 33 of the Act to the above extent but they considered that that was not enough as in their opinion even this much amount was not liable and so wanted that the reference be sent on and I have done so accordingly.

14. As required by section 66 (5) of the Act, a copy of your Lordships' decision may kindly be supplied to me for further action.

Coltman with *Messrs. Mulla and Mulla* Attorneys, for the Assessees.

The Advocate General with the *Government Solicitor*, for the Crown.

JUDGMENT.

BEAUMONT, C. J.:—This is a refrence under section 66 (2) of the Income-tax Act, and the question raised by the Commissioner is, whether the remuneration or a part thereof (and if a part thereof which part) earned by the assessees as the Secretaries, Treasurers and Agents of the Company under the terms of the agreement Exhibit A is liable to be assessed for payment of income-tax and super-tax in British India.

The facts shortly are that the assessees are a firm carrying on business in Bombay, Calcutta, Indore and other places in India. They act as general agents for a company known as the Hukumchand Mills, Ltd., which is a company registered at Indore, and the terms of their service are regulated by the agreement made in Indore, which is Exhibit A. Under this agreement the assessees are appointed Secretaries, Treasurers and Agents. By clause 4, it is provided:—"The said firm shall be further entitled to charge and be paid commission at the rate of one per cent. on the gross sale proceeds of all cloth produced by the Mill in consideration of their services as the Selling Agents of the Company. The said commission of one per cent. payable to the said firm on the sale proceeds of the cloth as aforesaid shall be exclusive of any commission, brokerage or any other remuneration they may have to pay to other dealers, merchants or agents for the sale of the cloth which shall be borne and paid by the said Company." So that, under that clause, the assessees are entitled to a commission of 1 per cent. which was subsequently increased to 1½ per cent. on the gross sale proceeds of all cloth produced by the Mills of the Company wherever situate.

Then, under clause 10, it is provided:—"The said firm shall at any time hereafter, under the request in writing of the Directors for the time being of the said Company but at the sole costs and charges of the said Company open and maintain in Indore or/and Bombay or/and elsewhere (so long as the said Direc-

tors shall not by notice in writing require them to close the same but no longer) a shop suitable for the sale by retail of the cloth anu yarn manufactured at the said Company's mill and shall from time to time out of the cloth and yarn manufactured at the said Company's Mills, supply the said shop with so much cloth and yarn as there shall be a demand for. The said firm shall with the assistance of the Directors have the general management of the said shop and of the business transacted therein and the engagement and discharge of all clerks and servants required in the said shop. The salaries of all such clerks and servants shall be paid by the said company."

Then clause 11 provides:—"The said firm shall keep books of account in Indore for the use of the said Company and shall prepare and keep or cause to be prepared and kept therein, an account of all sales, proceeds of sale, wages and other receipts and disbursements taken, paid or made by the said firm for and on behalf of the said Company....." and then clause 16 provides:—"The said firm shall be at liberty to retain, reimburse and pay themselves out of the moneys of the Copmany all preliminary charges and expenses legal or otherwise of and incidental to the promotion, formation, registration and establishment of the Company and all the costs and expenses of providing and maintaining offices for the Company its successors and assigns, the salaries of clerks servants or workmen and all moneys expended by them on behalf of the Company its successors and assigns and all sums due to the said firm for commission or otherwise."

Under that clause it would be competent, in my opinion, for the assessees in managing the shop, which was subsequently opened in Bombay before handing over to the Company the proceeds of the sale of the cloth at that shop, to deduct the commission payable, and as this commission is payable on the sale of cloth and not on the profits, it is easy to arrive at the amount.

From the case stated it appears that the Company started a shop in Bombay which was managed under the agreement by the firm and sales of cloth were effected at that shop, and the Commissioner of Income-tax has assessed the assessees to tax in respect of the remuneration earned by them on the sales effected by the Bombay shop.

The only question raised in this reference is whether the assessees are liable to be assessed on the commission payable to them in respect of the sales of cloth at the Bombay shop. Now as I pointed out, under clause 16, the assessees might have deducted the commission on the sales of the shop so as to make all moneys payable in respect of that commission payable to them in Bombay. Of course, if they had done that the income would have been received in British India and no question would have arisen. It is admitted by the Advocate General that in fact they did not do that. The money was all sent to Indore and the commission was paid there. The question that we have to determine is whether the commission payable to the assessees in respect of the sale of cloth by the Bombay shop is income which accrues or arises in British India within the meaning of section 4 of the Income-tax Act. The fact that the commission might have been segregated and paid in British India seems to me to have an important bearing upon the question.

Mr. Coltman on behalf of the assessees says that the right to commission accrues or arises under the agreement and nothing else. He says that the whole of the proceeds of sale from the Bombay shop and any other shop owned by the company are paid in the normal course of business to the Company in Indore and his clients get a commission out of the whole amount and therefore the commission accrues or arises in Indore, which is outside British India.

On the other hand, the Advocate General says that the nature of the business carried on by the assessees, so far as it is material for the present purpose, is that they are carrying on the business of selling agents for the shop in Bombay, that they sell goods in Bombay, and they get a commission in respect of the proceeds of the sale, and that therefore their commission accrues and arises in Bombay. There is not, I think, any authority which is of much assistance. Mr. Coltman presses us with the decision of this Court in *Raja Bahadur Bansilal Motilal* v. *The Commissioner of Income-tax, Bombay* (1) in which it was held, the question there being whether the interest received by the assessee at Hyderabad on Government of India Promissory notes enfaced for payment at Hyderabad Treasury can be deemed to accrue in British India, that the words "accruing or arising" were more extensive than "received" and that you have to look to the source from which the income arises. That case is quite different upon the facts from the present case, and does not help us to determine the source of the income with which we have to deal. I think this case is near the line, and that there is a good deal to be said for the arguments on both sides, but upon the whole I prefer the arguments of the learned Advocate General. I think that this income being commission upon sales made in Bombay does accrue or arise in British India and none the less so because as matter of practice between the parties it is paid in Indore, and the ultimate right to it arises under an agreement made in Indore.

The figures are agreed and accordingly in my judgment the question asked by the Commissioner must be answered by saying that the remuneration amounting to Rs. 34,658 earned by the assessees as commission upon sales at the Bombay shop of the Company under the agreement Exhibit A is liable to be assessed for income-tax and super-tax in British India.

Costs payable by the assessees on the Original Side scale.

BARLEE, J.:—I agree. The assessees are a firm who act as selling agents for a Mill Company situated in Indore outside British India, and by the terms of their agreement they are entitled to a percentage on the gross sale value of all sales. In accordance with the same agreement a shop was established in Bombay for the sale of cloth produced by the Mill, and this shop was managed by the assessees.

The question which we have been asked to decide is whether the remuneration or a part thereof earned by the assessees as the secretaries, treasurers and agents of the company under the agreement is liable to be assessed for payment of income-tax and super-tax in British India.

The governing section is section 4 (1). This says:—"* * this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India * *."

We have to see whether the commission of 1¼ per cent earned by the assessees on the sale of goods through the Bombay shop "accrued, arose or was received" in British India. The words 'accruing or arising' have been the subject of interpretation recently in this Court in *Bansilal Motilal* v. *The Commissioner of Income-tax, Bombay* (1) when it was decided that they indicate 'some origin or source of growth for the income in question' and that the words are used with reference to the place from which the income is derived and that the use of the word 'source' in the expression 'from whatever source derived' confirmed that view. It is conceded, therefore, that we have to find the source of

(1) 4 I.T.C 332.

the income earned by the assessees through the Bombay shop and two theories have been put before us. Mr. Coltman has argued that we must look for the source of this income in the agreement, since without the agreement between the assessees and the company they could not have recovered anything at all. On the other hand the learned Advocate General asks us to look to the shop in British India and the sales there as a true source. It seems to me that the latter view is the one which we must accept. Of course, the term 'source' can be interpreted in several ways, in the same way as the word 'cause' can be defined as the material cause, the final cause or the immediate cause and so on. But here I am of opinion that we must look to the material source of the income and not to what perhaps may be called a metaphorical source. In fact the shop was the actual source of the gross profits of the sales, and as the whole must contain the part, it seems to me that the source of the profits earned by the assessees under the agreement was the Bombay shop and must be looked upon as arising in British India.

For these reasons, I agree with the answer proposed by the learned Chief Justice.

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(404) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Mr. Justice Sir C. C. Ghose and Mr. Justice Buckland.

(24th November 1930).

Messrs. Lachhiram Basantlal and Basantlal Nathani .. *Assessees.**

v.

The Commissioner of Income-tax, Bengal .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 22 (2), 23 and 34—Assessment proceedings started by Income-tax Officer by issue of return notice—Transfer of case to Special Income-tax Officer by Commissioner—Assessment by him cancelled as without jurisdiction—Assessment by 1st Income-tax Officer on the basis of original notice, Legality of—Applicability of Sec. 34.

After the issue of a notice under Sec. 22 (2) of the Income-tax Act on the 30th April 1927 and reminders in June and July 1927 by the Income-tax Officer District II (1) Calcutta, having jurisdiction over the assessees' principal place of business, the case was made over by the Commissioner of Income-tax to a Special Income-tax Officer who after the issue of a fresh notice calling for a return made an assessment under Sec. 23 (4). Subsequently on a reference under Sec. 66 of the Act, the High Court held that the Special Income-tax Officer had no jurisdiction to make the assessment, whereupon the assessment made by the Special Income-tax Officer was cancelled by the Commissioner and an assessment was made by the Income-tax Officer. District II (1) on the 20th January 1930 for the year 1927-1928 on the basis of the original notice issued on the 30th April 1927.

HELD, that the illegal proceedings of the Special Income-tax Officer did not abrogate the notice of the 30th April 1927 which had not proceeded to a final assessment and assessment made on the basis of that valid notice served during the assessment year was legal.

* I. L. R. 57 Cal. 884; 33 C.W.N. 1206; A. I. R. (1930) Cal. 297.

Income cannot be said to have escaped assessment within the meaning of Sec. 34 of the Act at a time when there are pending assessment proceedings which have not yet terminated in a final assessment.

Case stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The question of law, hereinafter stated, which is being referred for the decision of the Hon'ble High Court under sub-section 2 of section 66 of the Indian Income-tax Act (XI of 1922), arises out of the assessment by the Income-tax Officer, District II (1), Calcutta, for the year of assessment 1927-28, of Lachhiram Basantlal and Basantlal Nathani, hereinafter referred to as "the assessees."

(2) The facts are as follows:—The assessees are a Hindu Undivided family carrying on business as share brokers and money-lenders and owning property within the jurisdiction of the Income-tax Officer, District II (1), Calcutta, who, on the 30th April, 1927, served upon them a notice under sub-section 2 of section 22 of the Act to make return of income for the year of assessment 1927-28. On the 15th December 1927, no return having been meantime submitted, my predecessor transferred the assessment for 1927-28 to the Special Income-tax Officer to be made by him and that officer made the assessment for that year on the 30th March 1928. The Hon'ble High Court subsequently decided* that the Special Income-tax Officer had no jurisdiction to make the assessment, the order appointing him not being covered by the terms of sub-section 4 of section 5 of the Act. In consequence of that decision, on the 26th August 1929, my predecessor cancelled the assessment made by the Special Income-tax Officer. Thereafter the Income-tax Officer, District II (1), proceeded to make the assessment for that same year on the basis of the original notice under section 22 (2) which he had issued and served upon the assessees as explained above. On the 25th September, 1929, he reminded the assessees of their obligation to submit return. They denied any such obligation, but the Income-tax Officer over-ruled their objection, whereat they submitted return under protest, and, after proceedings under section 23, assessment was made under section 23 (3) on the 20th January 1930. Against this assessment the assessees having preferred an appeal, the appeal was dismissed by the Assistant Commissioner.

(3) Under section 66 (2) the assessees have required me to refer the following questions to the Hon'ble High Court.

1. Whether the assessment of tax for the year 1927-28 made on the 20th January 1930, by the Income-tax Officer, District II (1), Calcutta, under section 23 (3) of the Income-tax Act on the basis of a notice for assessment of such tax issued by the then Income-tax Officer, District II (1), on the 30th April, 1927, under section 22 (2) of the Income-tax Act is legal having regard to the following points connected with the case:—

(*a*) That after such notice the case was taken over by the Commissioner and handed over to the Special Income-tax Officer.

(*b*) That such Special Income-tax Officer issued notice under section 22 (2) in respect of the same income, in connection with the assessment for the very same year.

* Reported as 4 I.T.C. 107.

(c) That such Special Income-tax Officer proceeded to make an assessment of income which was upheld upon appeal by the Assistant Commissioner on the 14th June 1928, and confirmed in Revision by the Commissioner of Income-tax on the 21st February 1929.

(d) That no action was taken upon such original notice until the 25th September 1929, when the Income-tax Officer, District II (1) asked the assessees to comply with the terms of the notice under section 22 (2) issued on the 30th April 1927.

2. Whether in the circumstances of the case the said notice dated the 30th April 1927, must not in law be deemed to have been abandoned and withdrawn.

3. Whether it is competent for an Income-tax Officer after having given notice under section 22 (2) and not having taken any action thereon to proceed to make an assessment after more than one year (in the present case over two years) after the expiry of the financial year for which the original notice was given.

4. Whether the assessment made by the Income-tax Officer on the 20th January 1930, is legal having regard to the provisions of section 34 of the Income-tax Act.

5. Whether such assessment made on the 20th January 1930, is in compliance with the terms and intention of the Income-tax Act?

6. Whether the Income-tax authorities are in the circumstances entitled after any length of time to rely upon the said original notice dated the 30th April 1927, after having treated the same as abandoned.

7. Whether the Income-tax Officer, District II (1), had any jurisdiction to make any assessment after the case was withdrawn from him by the Commissioner and made over to another Officer and which making over was held to be without jurisdiction by the High Court unless and until the case was again made over by the Commissioner to the Income-tax Officer, District II (1), by a fresh order.

(4) These questions are too diffuse to be suitable for reference and I do not refer them.

(5) The question of law which is referred is this: "In the circumstances was the assessment valid and legal?"

(6) My opinion is as follows:—When a notice under section 22 (2) has been duly served upon an assessee before the expiry of the year of assessment, the assessment may be completed without recourse to the provisions of section 34, nor is there any period of limitation within which assessment proceedings must be completed. The proceedings before the Special Income-tax Officer, having been without jurisdiction, were a nullity and to be ignored.

(7) In my opinion, therefore, the answer to the question is in the affirmative.

S. N. Banerji and *S. C. Bose*, for the Assessees.

N. N. Sircar (Advocate General) and *Dr. Radhabinod Pal*, for the Crown.

JUDGMENT.

RANKIN, C. J.:—In this case, certain assessees were being dealt with for the year of assessment 1927-28. The assessees' year of accounting was Sambat Year 1983 and, on the 30th April 1927, a notice was issued by the Income-tax Officer of the District in which the assessees' principal place of business was situate—he being the Officer who had jurisdiction over them for the purpose of income-tax. This was the ordinary notice under sub-section (2) of section 22 of the Act calling upon the assessees to furnish a return. The assessees did not furnish the return and several reminders were issued by that Income-tax Officer of the District in June of 1927 and again in July of 1927. On the 13th December 1927, the Commissioner purported to appoint Mr. P. L. Bhattacharjee, Special Income-tax Officer to deal with what he conceived to be a class of cases which would include the present case. The order was that he was to "perform all the functions of an Income-tax Officer in respect of those persons in Calcutta whose cases may be made over to him by me from time to time." It has subsequently been held that that order was not within the power of the Commissioner upon a true construction of the Income-tax Act and the consequence is that Mr. Bhattacharjee obtained under the Act no power to impose assessment upon these assessees or to deal with their case as an Income-tax Officer at all.

On the 15th of December, the Commissioner recorded an order "In accordance with my order No. 7257C. T. dated the 13th December 1927, the case is made over to Babu Phanindra Lal Bhattacharjee, Income-tax Officer, for necessary action." That order purports to transfer to Mr. Bhattacharjee not the duty of commencing the proceedings all over again but to transfer to him the case as it then stood. A perfectly good notice or rather series of notices under section 22 (2) had prior to the Commissioner's order been issued by the Income-tax Officer of the assessees' District. The proceedings that took place before the Special Officer and which have now to be treated at the instance of the assessees as wholly nugatory are these: that the Special Officer issued a fresh notice calling for a return, that apparently he did not get the return, that he issued another notice calling upon the assessees to furnish their accounts and that ultimately, on the 30th March, he purported illegally, as we now know, to make an assessment upon them to the best of his judgment on their default. That assessment did not conclude the proceedings because, on the 14th of July 1928, the assessees appealed to the Assistant Commissioner against the assessment made by the Special Officer and this proceeding before the Assistant Commissioner was, as I understand, still pending and in existence at the time when in another case it was determined that Mr. Bhattacharjee had no right to deal at all with cases such as the case of the assessees and that all his acts were null and void. That being so, on the 25th of September 1929, the Income-tax Officer of the District who had jurisdiction over the assessees from the beginning and whose jurisdiction never terminated by the illegal order of the Commissioner issued a reminder calling again upon the assessees to file a return. It appears that this time the assessees filed a return on the 21st October 1929 but did so under protest. In December of that year, they further produced their books of account and, on the 20th of January 1930, an assessment was made by the Income-tax Officer of the District under sub-section (3) of section 23, that is, in the ordinary course and not as an assessment against the assessees on the footing of default.

Now, before the Commissioner of Income-tax, the assessees took the point that it was not open after September 1929 to the Income-tax authorities to make any assessment of income-tax upon these assessees and they pointed to the fact that September 1929 was more than one year from the expiry of the financial year 1927-28. They called in aid section 34 of the Income-tax Act and the question which has been referred to us at their instance is whether, in the circumstances, the assessment was valid.

In my opinion, the assessment is valid. Section 34 deals with income which has escaped assessment and it may be, though it is not necessary for the present purpose to decide it, that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. I do not proceed upon that footing because it is unnecessary for the purpose of the present case. At all events, income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof. In the present case, there was a perfectly valid notice issued by the Income-tax Officer of the District on the 30th April 1927. Action had been taken by him by way of reminder on three occasions thereafter. The illegal proceedings of the Special Officer in no way have effect to abrogate the notice of the 30th April 1927 and, in my judgment, when it was found in August 1929 that the proceedings before the Special Officer were nugatory the position then was that a valid notice having been issued in April 1927 that notice had not yet proceeded to a final assessment and nothing had happened which entitled the assessees to say that the Income-tax authorities might no longer rely upon that notice. In my judgment, the position is that the proceedings for assessment were taking a dilatory course, having regard to the mistake made about the meaning of section 5 of the Income-tax Act in the Commissioner's order of December 1927. The proceedings are still pending and, in my judgment, the question put to us should be answered in the affirmative and the Income-tax authorities should have their costs of this Reference against the assessees.

GHOSE, J.:—I agree.

BUCKLAND, J.:—I agree.

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(405) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

(25th November, 1930).

Messrs. Bhajan Lal Sanwal Das .. *Assessees.*

v.

The Commissioner of Income-tax, United Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 3 and 66 (2)—Hindu Joint family—Members carrying on separate business and acquiring properties in individual names—Investment of family funds in part—Property and business income, if assessable as joint family income—Question, one of mixed fact and law.

Where two brothers of a Hindu family consisting of four brothers were carrying on a separate business for some years and acquiring property in their own names with funds in part belonging to the joint family and it was admitted that there was no partition of the family, the understanding among them being to treat the business and the properties as the two brothers' own properties and to allot them as part of their share in the event of partition,

HELD, that the question whether the family was joint or not was one of mixed fact and law and that on the facts of the case all the properties including the income earned in separate business would be joint family property.

Case [Miscellaneous Case No. 236 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

CASE.

The assessee in this case is a Hindu undivided family residing in the Fatehabad tahsil of the Agra district and the claim for a reference to the High Court relates to the assessment of income-tax on March 1, 1929, for the year 1928-29. In it the assessee has raised a number of points as follows:—

(1) Whether income derived from interest which has been assessed in previous years on the basis of the accrual of the interest can be assessed on the basis of the receipts in any year when a large amount of arrears of interest is realised;

(2) Whether or not is the self-acquired income of some of members of an undivided Hindu family who live and carry on business separately in their own name and in face of solemn affirmation of the members that the income of that business is not thrown to the common stock of such family, assessable to income-tax as a part and parcel of the income of such family merely by such members residing in the house property belonging to the said undivided Hindu family;

(3) Whether the imposition of a penalty under section 46 (1) of the Income-tax Act "stands automatically cancelled if the amount of income-tax is paid before the receipt of the notice imposing the penalty, in case where the assessee has appealed and applied for extension for time for payment and no reply to such application" has been received.

(4) (*a*) Whether or not the making of a demand under the Income-tax Act, 1922, is legal without any direction to that effect being made on the record of the case as prescribed by the Act.

(*b*) Whether the imposition of a penalty under section 46 of the Act is legal without any direction to that effect being made on the record of the assessment.

(5) Whether the appellate order in this case is defective and null and void because the Assistant Commissioner did not come to a decision on one of the grounds of appeal.

The points which have been raised in this application are so varied and so separate from each other that rule 11 of the rules which were framed by the High Court of Judicature at Allahabad in their notification No. 606|35, dated February 16, 1925, comes into play and I propose to deal with each of the points in a separate order—the more so as I shall find that with reference to some of the points the questions are not of law but of fact or that no demand for a reference lies under the provisions of the Income-tax Act.

2. This order relates to the second of the questions noted in the foregoing paragraph.

3. During the course of enquiries at Fatehabad the Income-tax Officer learnt that Anant Ram and Basdeo, the brothers of Bhajan Lal (whose name appears in the name under which the family is assessed), were carrying on the business of money-lending at Fatehabad in the name of Anant Ram Basdeo.

On being questioned Bhajan Lal stated that Anant Ram and Basdeo were members of the joint family to which he belonged but that the income received by Anant Ram and Basdeo from their money-lending had not been added to the joint family fund. The Income-tax Officer proceeded to investigate this matter and issued a notice accordingly to Anant Ram and Basdeo under section 37 of the Income-tax Act. Anant Ram appeared and made a statement to the effect that he and Basdeo had been carrrying on business at Fatehabad for about five or six years and that the money originally invested in this buusiness had in part been obtained from joint family funds, and in part was money belonging to himself and Basdeo although he was unable to explain the source whence this money was originally obtained. Anant Ram further admitted that there was joint family property of which the income was accounted for in the accounts of the joint family; he added that there were two shops which were purchased in 1982-83 Sambat (1926-27 A.D.) which belonged to Basdeo and himself and the income of which had not been included in the joint family income. Anant Ram further admitted that the residential house and another house were still joint property. On this evidence the Income-tax Officer formed the conclusion that Anant Ram and Basdeo were members of the joint family and he therefore added the income which was alleged to have been theirs separately to that which was admittedly the income of the joint family. The assessee filed an appeal on this point among others but the appeal was rejected by the Assistant Commissioner an extract from whose order is given in the Appendix to this statement.

4. When the case first came before the Commissioner it appeared to him that the Income-tax Officer might with advantage have sought for the explanation of the position which had arisen and he accordingly referred the matter to the Assistant Commissioner for enquiry. Bhajan Lal did not appear before the Assistant Commissioner although a notice was duly served on him and the Assistant Commissioner therefore went to Fatehabad where he saw Anant Ram and Basdeo. His report on the subject is as follows:—

"I———went this morning (March 8, 1930) to Fatehabad myself, made enquiries on the spot and also took down the statements of Anant Ram and and Basdeo.

"I think the case turns largely on the statements made by them and I, therefore, base my finding thereon. I have recorded the statement of Anant Ram in full and Basdeo has corroborated that statement and had nothing more to add. I, therefore, give here the relevant extracts from his statement.

'We are four brothers. Babu Ram is separate from us.....Babu Ram has been allotted his share in property and everything. There has been no partition amongst us four brothers, but we two (Anant Ram and Basdeo) manage the business here (at Fatehabad) and Bhajan Lal (brother) and Fateh Chand (nephew) manage the business of the joint family. We have an interest in the business at Pokharia (the business of the family) but they (the family) have nothing to do with the business we have here.

'We had taken some money from the family in the beginning and we (Anant Ram and Basdeo) had some money of our own. We cannot say how much we had taken from the family. The price of the shop purchased at Fatehabad was paid by me and my brother. We treat the business at Fatehabad as ours, in spite of the fact that the business here has been carried on also with the capital of the family, as we have yet to get something from the family whereas they cannot get anything from us, for whatever we have taken so far is less than our share. When there is a partition in the family, the business at Fatehabad will be treated as our self-acquired property, as it is, and the family will have nothing to do with it.'

'The sale-deed of the shop is in favour of myself and my brother (Basdeo) and, whatever property we purchased, is in our name. The house, which is being built, is also owned by me and my brother and Bhajan Lal and Fatehchand have nothing to do with it. The old house, which has now been demolished and is being built into a pakka one, was purchased 10 years ago.....I cannot say with what money the house was purchased. I have no other evidence to adduce.'

"I think the statement made by Anant Ram represents the actual state of affairs to a very large extent. It is a fact that there has been no partition amongst the four brothers and that in the business at Fatehabad the capital of the family was also invested. It is said that the two brothers had some money of their own also, which they invested in this business. It may have been so, but there is nothing definite to prove that. In any case, since it is admitted that the business at Fatehabad was carried on with the joint family fund also and since the assessee is unable to say how much he invested from his own purse and how much from the purse of the family, it is difficult to treat the business at Fatehabad as their self-acquired property. There appears to be some understanding amongst the four brothers that, when a partition does take place, the business and the property acquired by the two brothers at Fatehabad will be treated as their own and their share will first be met from the business and the property at Fatehabad. This, however, is not sufficient to prove that the business at Fatehabad is their separate business. I think that the mere fact that they would, in the event of the partition, get the Fatehabad business and property as a part of their share is not sufficient to make the property and business at Fatehabad their separate property. The chief criterion is whether at the time of the partition the whole property including that of Fatehabad will be thrown into the common stock and then partitioned or will be treated as separate. It is clear from the statement of Anant Ram that, whatever they have got at present at Fatehabad is less than their share and that they are yet entitled to have something from the joint family property, that the business and property at Fatehabad are not really their self-acquired property but that there appears to be an understanding that, as and when a partition takes place, their share will first be met from their business and assets at Fatehabad.

"I have also made enquiries at Fatehabad from the Tahsildar as well as other persons and they told me distinctly that every business and property, whether at Fatehabad or at Pokharia, were owned by all the four brothers jointly. I, therefore, hold that the business at Fatehabad is not the separate business of Anant Ram and Basdeo but that of the family."

5. The point of law which in the opinion of the Commissioner arises is:—"In the circumstances stated was the income received by way of interest at Fatehabad the income of a joint Hindu family, or the separate income of certain members of that family?"

6. In the opinion of the Commissioner the income belonged to the joint Hindu family.

JUDGMENT.

This is a reference by the learned Commissioner of Income-tax and relates to only one of the several questions on which he was called upon to make a reference. The question as formulated is point No. 2 and runs as follows:—"Whether or not is the self-acquired income of some of members of an undivided Hindu family who live and carry on business separately in their own name and in face of solemn affirmation of the members that the income of that business is not thrown to the common stock of such family, assessable to income-tax as a part and parcel of the income of such family merely by such members residing in the house property belonging to the said undivided Hindu family?"

The question is briefly whether in the circumstances established by evidence, the family should be treated as a joint Hindu family, or whether the income derived from the business done and property owned at Fatehabad should be treated as the separate property of two of the members, namely Anant Ram and Basdeo and should not be treated as part of the joint family property.

We are of opinion that the family should be treated as a joint family and the income from business and property at Fatehabad should be treated as a part of the joint family income. We need not go into the details of the evidence, for our duty is confined to pronouncing an opinion as to the inference alone. The question whether a family is a joint one or a separate one is a mixed question of fact and law. The facts have been found, and we have to draw the proper inference according to law.

The two members Anant Ram and Basdeo could not point out to any separate funds out of which the business grew. They admitted that a part at least of the funds that were invested at Fatehabad came from the joint family business. The same is the case with the funds that were employed in acquiring the property at Fatehabad. In the circumstances the whole property should be treated as joint family property. The income by way of interest earned at Fatehabad is also a part of the income of the joint family. This is our answer to the reference. We allow costs of this reference against the assessee. We assess the fee payable to the Government Advocate at Rs. 100. One month is allowed to the Government Advocate to furnish his certificate of fee.

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(406) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice and Mr. Justice James.

(2nd December, 1930).

Butto Kristo Kamala Kanta Saha, Firm .. *Assessees.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 28 and 66 (2)—Income concealed—Penalty notice—Concealed income, determination of—If limited to amount disclosed in assessees' accounts—Estimating real income, if legal—Opportunity to show cause—Allegation of trust—Questions, if referrable to Court.

In determining the amount of income concealed by an assessee for the purpose of imposing a penalty under Sec. 28 of the Income-tax Act, the Income-tax Officer is not restricted to the amount shown by the assessee's own books to have been omitted from the return and it is open to the Officer to assess the real income by estimating the amount of income concealed and to levy a penalty accordingly if he has reasonable cause for distrusting the accuracy of the books.

The questions whether the assessee had reasonable opportunity of being heard in respect of proceedings under Sec. 28 of the Act and whether the Income-tax Officer was justified in disbelieving the existence of trust in respect of a fund alleged to have been concealed by the assessee are questions of fact on which the Commissioner of Income-tax could properly refuse to state a case.

Case [Miscellaneous Judicial Case No. 127 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Butto Krishna Kamala Kanta Saha are a Hindu undivided family carrying on business of several kinds at Maroofgunj in Patna. They are assessed by the Income-tax Officer, Patna-Shahabad Circle, through and in the name of Babu Abani Kanta Saha, the head or karta of the family, hereinafter referred to as "the assessee." His assessment for the year of assessment 1928-29 was originally made under section 23 (4), but subsequently re-opened under section 27 by the Income-tax Officer. Notices under sections 23 (2) and 22 (4) were duly served, and books were produced on the 27th April, 1929. In those books the Income-tax Officer found an account styled "Dinabandu Saha's account." This account showed a total net credit of Rs. 6,036 from 9 subsidiary accounts, including accounts of dealings in mustard oil, commission and grain. This credit had not been included in the return, or in the statement of accounts filed with the return, nor had it been incorporated in the profit and loss account in the ledger. Babu Abani Kanta Saha informed the Income-tax Officer that the transactions recorded in this account were of a separate trust business. The Income-tax Officer found reason to disbelieve this account of the matter and, there and then (on the 27th April), issued a notice under section 28 upon Babu Abani Kanta Saha, directing him to show cause on the 29th April, why penalty under section 28 of the Income-tax Act should not be imposed upon him for concealment of income.

On the 29th April, a pleader on behalf of the assessee, submitted a petition for time for a week for the purpose of studying the matter. The prayer was allowed and the hearing was adjourned to the 6th May, on which date the pleader again applied for time, but the Income-tax Officer refused to grant further time. Thereupon, the pleader filed a written statement. In that statement it was said that the "account Dinabandhu Saha" represented a fund of which the assessee was the trustee. No further explanation or any details were given. The Income-tax Officer, after considering the cause shown, held that the assessee had failed to prove that the income in question was income of a trust, had been guilty of concealment of income, and was liable to penalty under section 28. He proceeded to estimate the income concealed. The profit shown from 8 subsidiary accounts was accepted by him. The 9th subsidiary account was of transactions in mustard oil. This account stood as follows:—Cr. Tins 21691 at Rs. 2,07,789-13-0 Dr. Tins 21691 at Rs. 2,06,037-10-0. The profit shown was, therefore, Rs. 1,752 or less than 1 per cent. This being an extraordinarily low rate of profit for sales of mustard oil, he called for the invoices of purchases, but the assessee informed him that they had all been eaten by white ants. He disbelieved this explanation, and, rejecting the book profit, estimated the profit at 6¼ per cent net on the turnover. The profit in the whole "Dinabandhu Saha's account" thus came to Rs. 17,260. This amount was included in the total income, and a penalty at the rate applicable on the same amount was imposed under section 28.

The assessee appealed to the Assistant Commissioner. He put forward that the time allowed to show cause under section 28 was too short, that the profits in the "account Dinabandhu Saha" being those of a trust, and not liable to income-tax, there had been no concealment, and that the profits of that account should have been estimated according to his books. No explanation whatever of the nature of the trust was put forward, nor were any details supplied. The Assistant Commissioner held that sufficient time had been allowed to show cause, that the assessee had failed to prove that the business was a trust, that the profits had been rightly included in the assessment, and penalty justifiably and legally imposed under section 28. In regard to the determination of the amount of profits accruing in the "account Dinbandhu Saha," the Assistant Commissioner remarked that the record did not show that the Income-tax Officer had called for invoices of purchases of mustard oil, but held that, as the assessee had explained that the invoices had been eaten by white-ants, there was no alternative

but to reject the book profit and make an estimate. But he considered the percentage of 6¼ per cent net taken by the Income-tax Officer to be excessive and reduced it to 4½ per cent., making a corresponding reduction in the amount of penalty. It may be noted that the remarks of the Assistant Commissioner, that the record did not show that the Income-tax Officer called for invoices, was beside the point, since it was incumbent upon the assessee to be ready with all evidence in support of his books at the time of his assessment.

2. The assessee has required me to refer to the Hon'ble High Court the following points of law:—

(1) How should the calculation of the amount of income-tax which would have been avoided, as embodied in para 1 of section 28 of the Income-tax Act, to be made? Is the amount of income found in the account alleged to be concealed to be taken for such calculation, or the amount which may be estimated as income by the Income-tax Officer?

(2) Had the assessee reasonable opportunity of being heard on the notice under section 28 in this case?

(3) Is the penalty under section 28 imposed in this case tenable?

(4) Was the Income-tax Officer justified in not omitting the income from House property in calculating the penalty and is the calculation otherwise correct?

(5) Can a trust be created otherwise than by a deed? Was the Income-tax Officer justified in disbelieving the existence of the trust in this case?

(6) Was the assessee bound in terms of the notice issued under sections 22 (2) and 38 to disclose the trust?

(7) Could the assessment be legally pushed (*sic*) as done by the Assistant Commissioner after holding that notice for production of invoices in Dinabandhu Saha's account was not served on the assessee?

(8) Had the assessee any reasonable opportunity to produce evidence in support of his books?

(9) Is the assessment legal and tenable?

3. My opinion on each separate question is given below.

Question 1. The question as worded is obscure. I think that the applicant's intention would be represented by the following:—In determining the amount of income concealed by an assessee, in order to impose a penalty under section 28 of the Indian Income-tax Act, XI-22, is an Income-tax Officer restricted to the amount shown by the assessee's own books to have been omitted from his return, or is it open to him to estimate the amount of income concealed, and to levy a penalty accordingly, if he has a reasonable cause for distrusting the accuracy of the books?

The answer to this question is, I submit, that the penalty must follow the assessment. If the circumstances are such that the Income-tax Officer is justified in including an estimated sum in the income to be assessed he is equally justified in imposing a penalty under section 28 calculated with reference to that estimated sum.

4. *Question* 2. The facts are set out in paragraph 2 of this statement. If the assessee had had any true explanation to offer, he would have been ready

with it there and then. He was served with a notice on the 27th April to show cause on the 29th April. On the latter date a week's time was allowed. This interval was quite sufficient for the assessee to prepare his case. My opinion, therefore, is that the question should be answered in the affirmative.

5. *Question* 3. The reference in this question is not apparent. The learned pleader, whom I heard in connection with this application under section 66 (2), said that the question referred to question 2 and also to other points, but did not specify what these other points were. As no objections are specified, the question should be answered in the affirmative.

6. *Question* 4. A reference to the assessment note will show that the Income-tax Officer did not include the income from House Property in the penalty, nor is it specified in what particular respects the calculation was otherwise incorrect. I therefore do not refer this question.

7. *Question* 5 contains two questions in one. The answer to the first part of the question "Can a trust be created otherwise than by a deed?", is in the affirmative, but the question does not arise out of the present facts, and I do not refer it. I refer the second part of the question *viz*, "Was the Income-tax Officer justified in disbelieving the existence of the trust in this case?" My opinion is as follows:—Evidently if an assessee asserts that a certain income shown in his books is not liable to assessment as part of his income, profits and gains, the onus lies on him of proving his assertion, and unless he proves it to the satisfaction of the Income-tax Officer, it is the duty of the Income-tax Officer to hold that it has not been proved. In this case neither before the Income-tax Officer nor before the Assistant Commissioner did the assessee make the slightest attempt to prove that a trust existed. No details whatever of the nature of the trust were supplied. When I heard the assessee in connection with the application under section 66 (2), he gave me the following account. Some ten years ago certain of his customers in Murshidabad died leaving certain assets with him, which, as the heirs were not forthcoming, he realised and invested the money as a trust in his business. Had this account been fact, the assessee would have been ready with his explanation and with evidence to establish it, before the Income-tax Officer. The account is not evidence at this stage, is unsubstantiated and plainly concocted. My opinion is that the question should be answered in the affirmative.

8. *Question* 6. My answer to this question is contained in my answer to question 5.

9. *Question* 7. The language of this question is defective and its meaning obscure. I pointed this out to the learned pleader who appeared before me but he failed to explain the meaning of the question. The point intended appears to me similar to the point raised in question 8. I therefore omit question 7 from the reference.

10 *Question* 8. The learned pleader for the assessee explained to me that the submission implied in this question was that the assessee should have been allowed time to procure and produce duplicate invoices from the mills from whom he had made purchases of mustard oil in order to explain the low rate of profit in that commodity shown in his books. My opinion on this question is as follows:—It was incumbent upon the assessee to be ready with evidence in support of his books at the time of assessment. After explaining that the original invoices had been eaten by white ants, an explanation obviously concocted and untrue, the assessee made no submission that he should be allowed to produce duplicate invoices. Had the assessee been sincere in his desire to produce evidence, he would have procured and tendered the duplicate invoices at the appeal. My opinion, therefore, is that the question should be answered in the affirmative.

11. *Question* 9. No grounds for holding the assessment illegal being stated, the question should be answered in the affirmative.

S. N. Basu, H. B. Das Gupta and *S. N. Banerji*, for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—The assessees are carrying on business as traders for the purchase and sale of mustard oil in Patna. On the 12th of April, 1928, they were served with a notice under section 22, sub-section (2) to file a return. They filed a return, and then they were served with notice to produce their account books. Eventually they did produce these books and then it was found that there was one series of transactions with a person who is named in the assessees' books as Dinabandhu Saha, the income from which had not been disclosed in the return. The account books showed a series of receipts from the dealings with this person Dinabandhu Saha and showed the total as Rs. 6,036 and the first item was in respect of profits from transactions in mustard oil Rs. 1,752. On this disclosure the Income-tax Officer served upon the assessees a notice under section 28 to show cause why a penalty should not be imposed upon them. That notice was dated 27th of April, 1928, and they were called upon to show cause two days thereafter. They then appear to have instructed a legal adviser who filed a petition asking for postponement because he had not been able to go into the case and a postponement was granted until the 6th of May. On the 6th of May the assessees filed a fresh petition for further time which was rejected and therefore on the same day they filed a petition by way of showing cause against the infliction of the penalty and substantially their excuse for not disclosing these accounts with Dinabandhu Saha was that it represented a fund of which the petitioners said they were trustees. The Income-tax Officer investigated this matter and came to the conclusion that the whole story of a trust fund was untrue. It appeared that first of all the assessees began by stating that Dinabandhu Saha was their great grandfather. Later on the story varied and they said that as a matter of fact the alleged fund was the result of the gradual accumulation of a fund which had been left in their hands at some time by one of their customers of whom they were now unable to find the heirs and that they had kept that fund as a separate matter in their business accounts and that they regarded themselves as trustees of the profits. It is needless to say that this absurd story was entirely rejected by the Income-tax Officer.

The question then arose as to what penalty should be inflicted. Now, as I have said, the total amount of receipts as disclosed by the assessees was Rs. 6,036 and it was the business of the Income-tax Officer to ascertain what part of that could reasonably be regarded as profits. As to the dealings in mustard oil, which were stated in the account as Rs. 1,752, the Assistant Commissioner revising that decision of the Income-tax Officer came to the conclusion that this sum did not really represent the profits of the business. He found the total turnover in mustard oil was Rs. 2,06,037 and he estimated the profit at 4½ per cent. making Rs. 9,271. He dealt with other items on somewhat similar basis and arrived at the rate of profits which was to be attributable to those transactions, and having first of all corrected the statement of the income receivable from Dinabandhu Saha's account he proceeded under section 28 to levy the tax upon that income and then he proceeded to levy a penalty equal to the amount of the tax which would have been leviable if the income had been properly returned by the assessees in the first place and in so doing he was only following the scheme provided by the Act.

Now one or two objections are raised by the assessees to this procedure. It was first of all contended, but afterwards it was frankly conceded by the learned Advocate on behalf of the assessees that this contention could not be

supported, that it was incumbent upon the Income-tax Officer to accept for the purpose of penalty the estimate of profit put forward by the assessees themselves when they had to disclose what they had concealed. The amount therefore of the penalty levied by the Income-tax Officer is perfectly correct.

The only other point that was raised on behalf of the assessees is this. It was said that the notice upon them was for concealing the particulars of income in the accounts of Dinabandhu Saha and did not relate specifically to the particular defect in the first item as to the method of calculating the profit on the dealings in mustard oil. To my mind there is no substance in that objection. Having first of all concealed his profits he should have really dealt with the items which he had been compelled to disclose, and the record shows no trace of the Assistant Commissioner being asked to allow the assessees further time in order to deal with the head of income under this particular item.

Now the questions put to us by the letter of reference are, firstly, whether in determining the amount of income concealed by the assessees for the purpose of imposing penalty the Income-tax Officer is restricted to the amount shewn in the assessees' own books to have been omitted from his return, or is it open to him to estimate the amount of income concealed and to levy a penalty accordingly if he has a reasonable cause for distrusting the accuracy of the books. I would answer this by saying that he is not so restricted and that it is open to him to assess the real amount of the income and to levy a penalty upon the amount so found, and in this particular case he had ample grounds for the decision which he arrived at.

The second question relates to whether the assessees had reasonable opportunity of being heard under the letters of section 28. That is really a question of fact. I do not think it was necessary to state it. He, however, has stated it and in my opinion the assessees had ample opportunity of being heard.

The third question is "Is the penalty under section 28 imposed in this case tenable?" As I have said, the penalty is properly levied.

The fifth question "Was the Income-tax Officer justified in disbelieving the existence of the trust in this case" is again a question of fact. In my opinion he was entirely justified in disbelieving that there was no credible evidence of any trust of this sort.

There are no other questions which arise in this case which need specific answers. There is no essential question of law of any sort or kind, and for my part I would say that the proper course was for the Commissioner of Income-tax to refuse to state a case.

In the end all the questions having been answered against the contention of the assessees I would direct the assessees in this case, particularly having regard to the wholly unbelievable dishonest story of the trust put up by them, to pay Rs. 200 as costs.

JAMES, J.:—I agree.

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(407) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice and Mr. Justice James.

(2nd December, 1930)

Messrs. Mohan Lal Hardeo Das *Assessees*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sections 22 (2) and 23 (4)—Return not containing entries required under Note 5—If a valid return —Submission of

return of branch income, effect of—Reports of branch income, non-receipt of—Assessment for default of return, Legality of.

A return sent by an assessee without entries of receipts and expenditure of his business required under Note 5 of the form and with a statement in the margin that a loss of Rs. 8,000 was sustained in the previous year and that as Khatas were not ready, the return was filled in by guess, would not be a valid return satisfying the requirements of Sec. 22 (2) of the Income-tax Act and rules made thereunder.

An assessee not sending a return of income to the Income-tax Officer having jurisdiction over his principal place of business but submitting returns of branch income to the respective Income-tax Officers having jurisdiction over branches, has failed to submit a return within the meaning of Sec. 23 (4) of the Act.

An Income-tax Officer not receiving a return of income from the assessee's principal place of business is entitled to proceed to assessment without waiting for reports from the Income-tax Officers to whom returns of branch income have been submitted.

Case [Miscellaneous Judicial Case No. 116 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act (XI-22) I have the honour to state the following case for the decision of the Hon'ble High Court.

2. Messrs. Mohan Lal Hardeo Das (hereinafter termed the assessees) are a Hindu Undivided family who carry on various kinds of business at four places in the District of Darbhanga and also at Calcutta and at Barhaya in the district of Monghyr. Their principal place of business is in Darbhanga, and they are assessed by the Income-tax Officer, Darbhanga, as the Income-tax Officer having jurisdiction over the area in which their principal place of business is situated. In connection with their assessment for the year of assessment 1928-29, the Income-tax Officer, Darbhanga, served upon them a notice under section 22 (2) of the Income-tax Act to submit return of their total income from all sources for the previous year. The said notice was served on the 25th April, 1928. The Income-tax Officer had previously, on the 2nd April, issued letters to the Income-tax Officer of Monghyr and to the Income-tax Officer, District IV (3) Calcutta, requesting them to report the income of the branch businesses at Monghyr and Calcutta respectively. The return was due to be submitted on the 25th May. On that day a petition was put in on behalf of the assessees to be allowed two months' time to submit the return on the ground that their gumashta was ill and the accounts were not ready. The Income-tax Officer allowed time till the 1st July. On the 3rd July the form of return was received back from the assessees. The form was not properly filled up, but in the margin it was written that, in the year ending Kartik 15 (October) 1984, being the previous year, they had suffered a loss of about 8,000 and that the return was approximate as the account books were not adjusted. The form was signed "Mohan Lal Hardeo Das by the pen of Parmeshwar Lal".

The Income-tax Officer wrote explaining that the return did not fulfil the requirements of section 22 (2), and was, therefore, no return at all. He instructed the assessees that the verification must be signed by an authorised person, and the particulars required by Note 5 of the prescribed form of return filled in. He further warned the assessees that, in default, the return would not be considered valid. The assessees in reply, forwarded a letter of

authority in the name of Parmeshwar Lal. They added that the return had been filled in haste, as the account books were not ready, and asked that the same be admitted and notice under section 23 (2) be issued allowing a fortnight's time, by which date they would be ready with a profit and loss statement and with their account books. The Income-tax Officer thereupon informed them that notice under section 23 (2) could not issue, unless a valid return was filed, and again gave warning that total income or total loss should be set down in the return and the particulars required by Note 5 submitted, otherwise the return would be treated as invalid. The assessees stated in reply that, "as regards the particulars to be submitted, the return was as usual, and, moreover, there was no sufficient space in the form of return to contain the complete particulars of the firm"; they added that, if they were served with a notice under section 23 (2), and if forms for that purpose were sent them they would submit a profit and loss statement. This reply was received on the 22nd August. The Income-tax Officer, on receipt, noted that the return was not valid, but ordered the case to be put up after the 4th October, in the hope that the assessee might correct the return in the course of their appearances in connection with their remanded assessment for the year 1926-27, which was pending at the time. This hope was unfulfilled, and, on the 14th October assessment was made under section 23 (4) for default of submission of return. It will be noted that the assessees had had some 12 months to close their accounts and submit a valid return.

Subsequently on the 17th October, report was received from the Income-tax Officer, District IV (3), Calcutta, that the assessees had filed before him a return of their income from their Calcutta branch, but had failed to produce their Calcutta books for examination on the 5th October, being the date fixed by notice under section 23 (2), on the plea that these books had been sent to Darbhanga for final adjustment. He further intimated that the assessees had requested that their Calcutta books might be examined at Darbhanga. On the 28th February of the next year, 1929 a report was received from the Income-tax Officer of Monghyr that return had been submitted by the assessees of their income from the branch business at Barhya in that district, but that, in response to notices under sections 23 (2) and 22 (4), which issued on the 11th February, they had replied that assessment had already been made by the Income-tax Officer, Darbhanga. These reports were filed by the Income-tax Officer, Darbhanga, as he had already completed the assessment.

The return submitted to the Income-tax Officer of Monghyr was defective in the very same respects as the return purported to be submitted to the Income-tax Officer of Darbhanga, but the Income-tax Officer of Monghyr accepted the same as valid.

The assessees submitted an application under section 27 in which they urged that the return submitted was valid, and the assessment under section 23 (4) illegal without issue of notice under section 23 (2). The Income-tax Officer rejected the application and refused to re-open the assessment, whereupon they appealed to the Assistant Commissioner, who upheld the order of the Income-tax Officer.

3. The assessees under section 66 (2) have required me to refer the following points of law to the Hon'ble High Court:—

(a) Whether the return filed by the assessees was an invalid return for the purpose of making an assessment under section 23 (4).

(b) Whether the return having been filed, the notices under sections 23 (2) and 22 (4) were bound to issue.

(c) Whether any assessment can be made under section 23 (4) when the return has been filed, but no notice under section 23 (2) has been issued and served.

(d) Whether the return filed at the principal place of business can be a basis of assessment under section 64, Income-tax Act.

(e) Whether the Income-tax Officer of Darbhanga was justified in rejecting the return and making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta.

4. My opinions on these questions are as follows:—

Question (a). "whether the return filed by the assessee was an invalid return for the purpose of making an assessment under section 23 (4)," is not happily worded, and, in fact, contains two questions in one; namely, (1) whether the return was invalid, and (2) whether the assessment under section 23 (4) was justified. The latter question is again stated in question (e), and I prefer to deal with it under question (e). Question (a) is, therefore restated for submission as follows— "Was the return, which was filed, a return which satisfied the requirements of section 22 (2) and the rules made thereunder." My opinion on this question is as follows: Section 22 (2) requires a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) total income during the previous year. Section 59 of the Act gives the Central Board of Revenue authority to make rules for carrying out the purposes of the Act. In exercise of that power the Central Board of Revenue have prescribed the form of return in Rule 19, Part II, Income-tax Manual, Volume 1. The form requires note 5 to be filled up. The assessees made no entries against Note 5. Moreover, it is obvious that an accurate statement of total income is required, not a mere guess, such as was submitted by the assessees. Section 52 of the Act declares a false statement in a verification mentioned in section 22 to be an offence under the Indian Penal Code. If assessees are allowed to submit guesses at their income by way of return, the object of section 52 will be made of no effect. Therefore the form filled up and submitted by the assessees, which purported to be a return was not merely an incorrect or incomplete return, but a mere nullity and not a return at all, and, in my opinion, the question should be answered in the negative.

Question (b), "whether the return having been filed, the notices under sections 23 (2) and 22 (4) were bound to issue", does not arise, if my opinion in regard to question (a) is found to be correct. Otherwise, the answer to the question is that issue of notice under section 23 (2) was obligatory upon, but issue of notice under section 22 (4) was at the discretion of, the Income-tax Officer.

Similarly *Question* (c), "whether any assessment can be made under section 23 (4) when the return has been filed, but no notice under section 23 (2) has been issued and served", does not arise, if my opinion in regard to question (a) is found correct. Otherwise, the question is due to be answered in the negative.

Question (d), "Whether the return filed at the principal place of business can be a basis of assessment under section 64 of the Act", in the form stated, does not arise, since the assessment was not "based" on a return, but was made under section 23 (4) for default to submit return. When I heard the assessees in connection with their application for a reference to the Hon'ble Court, they failed to touch on this question or to explain its meaning. What is apparently intended by the question is the submission that the asses-

sees had submitted returns of their income from their branch businesses at Monghyr and Calcutta to the respective Income-tax Officers of those places, and could not therefore be said to have failed to make a return. I therefore amend the question for submission as follows: "Is an assessee, who has failed to make a return to the Income-tax Officer having jurisdiction over his principal place of business, but has made returns of his income at his two branch businesses to the respective Income-tax Officers having jurisdiction over the areas in which those branch businesses are situated, failed to make a return according to the terms of sub-section (4) of section 23"?

My opinion on this question is as follows:—Sub-section (1) of section 64 of the Act provides that where an assessee carries on business at more places than one, he shall be assessed by the Income-tax Officer of the area in which is situated his principal place of business. Under sub-section 4 of the same section every Income-tax Officer is, notwithstanding the above provision, vested with all the powers conferred by the Act in respect of any income accruing within the area for which he is appointed, irrespective of whether the particular income is assessed by him or not. This particular provision was, however, inserted in the Act mainly in order to permit of enquiries being made into the profits of a branch business by the Income-tax Officer of the place in which the branch is situated, since it is generally more convenient to assessees to have the accounts of their branch businesses examined locally. Returns submitted to Income-tax Officers of branch businesses are not returns of *total* income, which can only be submitted to the Income-tax Officer of the principal place of business, who is the assessing officer, and default to submit such latter is clearly failure to make a return. My opinion, therefore, is that the answer to the question is in the affirmative.

Question (*e*), "whether the Income-tax Officer, Darbhanga, was justified in rejecting the return and making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta", contains two questions in one, namely, (1) whether the Income-tax Officer was justified in rejecting the return, and (2) whether he was justified in making the assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta.

Now, the appeal in this case was against the order of the Income-tax Officer, which rejected the petition under section 27, and the sole question, which the Assistant Commissioner actually dealt with and was authorised by law to deal with, was the question whether the assessees were prevented by sufficient cause from making their return. The second half of question (e) "whether the Income-tax Officer of Darbhanga was justified in making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta," concerns the merits of the assessment, and the consideration of this question was prevented to the Assistant Commissioner by the proviso to section 30 that no appeal lies in respect of an assessment under section 23 (4) read with section 27. The Assistant Commissioner did not, in fact, deal with any such question, which does not therefore arise out of the appellate order. Under section 66 (2) I am not authorised to refer for the decision of the Hon'ble High Court a question which does not arise out of the appellate order, and I therefore decline to refer the second half of question (e). I refer the first half only, viz., "was the Income-tax Officer justified in rejecting the return which was filed and making an assessment under section 23 (4)?" My opinion on this question is as follows:—If my submission in regard to question (a) is found by the Hon'ble High Court to be correct, it follows that, the return purported to be filed being a nullity, and no return at all, the Income-tax Officer had no power under the Act except to reject it and make the assessment under sec-

tion 23 (4). It is, therefore, submitted as my opinion that the answer to the question is in the affirmative.

S. C. Bose and *R. Misra*, for the Assessees.

C. M. Agarwala, for the Crown.

JUDGMENT

COURTNEY TERRELL, C. J.:—This reference under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax raises a number of questions which may in substance be reduced to one, which admits of simple and ready answer. The assessees carry on a business of rice mill owners and rice dealers. Their principal place of business is in Darbhanga. They have branch offices in Monghyr and Calcutta. On the 25th April, 1928, they were served with a notice at their principal place of business under section 22(2) to file a return of their income. On the 25th of May they applied for two months' time on the ground that their accountant was ill and that their books had not been completely filled up and they were given until the 1st of July, 1928, to make the required return. On the 3rd of July they submitted what purported to be a return and in my opinion the document which they submitted cannot be considered in any sense a compliance with the Act and the regulations made under it and is not a return at all. The regulations by note 5 require in the case of a mercantile business a return in a particular form setting forth a number of headings of receipts and expenditure. The statement made by the assessees simply returned the form containing the headings with the following comment in the columns which were required to be filled up: "There has been a loss of about Rs. 8,000 to the petitioner this year. The Khata is not ready. Hence the return of this firm is filled in by guess and is submitted". That statement constituted the entire return made by the assessees.

Now on the 4th of September 1928 the Officer dealt with this matter and recorded on the order sheet that this was no return at all within the meaning of section 22 (2). He further drew attention to the fact that it was signed by one Parmeshwar who apparently had no authority to make the signature and he directed notice to go to the assessees acknowledging the receipt of the document and directing him "to make good the deficit by the 11th of September, 1928, otherwise it will not be considered a valid return". This direction was carried out, and thereupon the assessees on the 11th of September wrote a letter enclosing an authority in favour of the person who had signed the so-called return so that so far as that defect alone was concerned the position would be rectified. But the assessees went on to say: "It is prayed that your honour will be pleased to admit the return and call for account books under a notice under section 23 (2) allowing a fortnight's time". The Income-tax Officer thereupon directed that the assessees should be notified that unless a valid return were made notice could not issue under section 23 (2). The direction was also carried out. Now we have been told that it has been laid down as a matter of law that when an assessee has in fact made a return he cannot be summarily assessed unless a further notice under section 23 (2) is served upon him to give him an opportunity of correcting defects in the return which he has made. This it is conceded is the law, or at any rate it is the view taken by the Calcutta High Court which we have no reason to doubt; but that provision for the protection of the assessee only applies to the case where the assessee has in fact filed a return, and not to the case of the assessee in which he has filed no return at all. The Income-tax Officer proceeded to assess the assessees, and it is against that assessment that complaint is made for the reason urged that the so-called return supplied on the 3rd of July, 1928, was a return and that the assessees have been deprived of the opportunity which they would have had had a notice under section 23 (2) issued

to them to correct the defects in the return. No return having in fact been made the objection fails.

There is a further objection to the return which is based upon the fact that the Income-tax Officer proceeded to make the assessment without waiting for the reports from the Income-tax Officers of Monghyr and Calcutta upon the state of affairs with regard to the local returns made in those places by the assessees. In my opinion the Income-tax Officer not having received any return from the assessees from their principal place of business was entitled to proceed to assessment without waiting for the returns. But we have in this case seen the returns which are part of the papers placed before us and there is no doubt whatever that the return, if they had been considered by him, should not have shaken in any way the assessment which he in fact made. The assessees are a commercial firm and it is admitted that they have made returns to income-tax in previous years. In those circumstances the assessing Officer was entitled to make the best of the information at his disposal obtained through those previous returns and to assess the assessees to the best of his ability.

I would answer the first question: "Was the return, which was filed, a return which satisfied the requirements of section 22 (2) and the rules made thereunder" in the negative.

The second question, which is put to us, is "Has an assessee, who has failed to make a return to the Income-tax Officer having jurisdiction over his principal place of business, but has made returns of his income at his two branch businesses to the respective Income-tax Officers, having jurisdiction over the areas in which those branch businesses are situated, failed to make a return according to the terms of sub-section 4 of section 23" and I would answer it in the affirmative. The obligation is to make a return from the principal place of business. That obligation is not discharged by making returns from branch businesses as to the income receivable in respect of those branches.

The third question is: "Whether the Income-tax Officer, Darbhanga, was justified in rejecting the return and making an assessment without waiting for the reports of the Income-tax Officers of Monghyr and Calcutta" and I would answer it also in the affirmative for the reasons which I have before stated.

The assessees must pay the costs: hearing fee Rs. 150.

JAMES, J.:—I agree.

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(408) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice and Mr. Justice James.
(3rd December 1930.)

Himat Ram Pali Ram, Firm *Assessees*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 22 and 63—Service of return notices—Personal service, if required—Service on Agent, when good service.

A notice under section 22 of the Income-tax Act need not be served personally on the assessee and service at the assessee's business premises on an agent exercising authority in respect of income-tax matters, though not authorised in writing in that behalf, is valid service under section 63 (1) of the Act.

In the case of a recognised agent carrying on business in the name of the principal, authority to accept notices under section 22 of the Act on behalf of the principal can be implied.

Case [Miscellaneous Judicial Case No. 101 of 1929] stated under section 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Himat Ram Pali Ram, hereinafter termed "the assessees," are a Hindu undivided family carrying on business of various kinds at Motihari, Bettiah, and in Calcutta. Their principal place of business is at Motihari, and they are assessed by the Income-tax Officer Champaran, as the Income-tax Officer with jurisdiction over their principal place of business. In connection with their assessment for the year of assessment 1928-29, a notice under section 22 (2) of the Income-tax Act (XI of 1922) was issued by the said Income-tax Officer. This notice was served by a peon of the department at their place of business at Motihari on the 12th April, 1928, and was accepted by their Gomostha Narain Ram on their behalf. No return having been received, on the 31st July a notice under section 22 (4), to produce accounts of all branches on the 29th August, was issued by registered post. On that date Narain Ram appeared with a petition for two months' time on the ground of absence of the maliks. The Income-tax Officer refused further time and informed Narain Ram accordingly, but Narain Ram refused to sign on the order sheet in acknowledgment, fearing, as he said, that he would lose his service. On the 30th of September assessment was made under section 23 (4). A return could have been put in at any time before this date. The accounting period of the assessees, it may be noted, is the Dewali year which ended somewhere about the end of October 1927.

An application under section 27 for reopening the assessment was made by the assessees. In this petition they sought to excuse themselves for not filing return by pleading that Narain Ram, owing to illness, had failed to communicate receipt of the notice under section 22 (2) to the proprietors, who were at the time absent on private business elsewhere. It was further denied that the failure to file return was deliberate. The legality of the service of the notice on Narain Ram was not questioned. The Income-tax Officer did not accept the plea and refused to reopen the assessment. Appeal was made to the Assistant Commissioner. In the written petition of appeal the assessees did not contest the validity of the service of notice under section 22 (2), but pleaded that they had not been informed of the receipt of notice by Narain Ram. At the hearing of the appeal, however, the learned counsel who represented the assessees took the additional ground that the notice under section 22 (2) had not been properly and duly served, no written authority having been given to Narain Ram by the assessees to accept service. The Assistant Commissioner considered this additional plea, but disallowed it.

An application under section 66 (2) was thereafter made to me to state a case to the Hon'ble High Court on three points, two of which only were pressed, *viz.*, (a) whether or not notices under section 22 are to be served personally on the assessee, and (b) whether the said notice served on a servant who was not authorised in that behalf was validly served. I refused to state a case on the ground that neither question arose out of the appellate order, since the assessees, by not contesting the validity of the service of the notice before the Income-tax Officer, had estopped themselves from raising this question at the appellate stage. The assessees applied under section 66 (3) and the Hon'ble Court have ordered me to refer both points of law.

2. The law is as follows:—Under sub-section (1) of section 63 of the Indian Income-tax Act a notice under the Act may be served as if it were a summons issued by a Court under the Code of Civil Procedure, 1908. Rule 12, Order V of the Rules of Procedure under the Code of Civil Procedure provides that:—Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

3. The facts are:—From the records of past assessment proceedings I find that Narain Ram has always exercised full authority on behalf of the assessees to do everything connected with income-tax on their behalf. In at least one year he received the notice under section 22 (2) without objection by the assessees and on one occasion he filed a profit and loss statement on their behalf under his own signature. The non-authority of Narain Ram was not pleaded before the hearing of the appeal. This plainly shows that the plea was an afterthought. The hearing of the appeal was on 20-2-29. On 12-4-29 the notice under section 22 (2) issued in connection with the assessment proceedings for 1929-30 was served at the business premises of the assessees and accepted by Narain Ram on their behalf. A petition for time to submit return was filed in which Narain Ram was described as the head gomostha "who looks after all these works". When the Income-tax Officer pointed out that the authority of Narain Ram to receive notice had been denied by them in connection with the proceedings for 1928-29, the assessees filed a statement signed by the head of the Hindu undivided family, otherwise called the proprietor of the firm, to the effect that "Narain Ram who received the notice under section 22 (2) issued in the name of the firm was authorised to do so." From the above circumstances I find that Narain Ram was authorised to accept the service of notice for 1928-29 as for other years.

4. On this finding of fact, therefore, my opinion is that question (a), as stated should be answered in the negative, and that the answer to question (b) is that the notice is question was validly served on Narain Ram, who was an agent empowered to accept service on behalf of the assessees.

K. P. Jayaswal and *A. K. Mitra,* for the Assessees.

C. M. Agarwala, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C. J.:—Under the direction of this Court the Commissioner of Income-tax has stated a case in which the following are material statements of fact.

The assessees are Hindu undivided family carrying on business of money lending at Bettiah, the principal place of business being in Motihari. The notice under section 22 (2) of the Income-tax Act was issued by the Income-tax Officer and was served by the peon at the principal place of business at Motihari and was accepted by the Gomashta of the firm named Narain Ram. No return was received, and on the 29th of August a notice under section 22 (4) to produce accounts was issued by registered post and on that date Narain Ram appeared with a petition for two months' further time on the ground of the absence of the maliks. The maliks themselves are resident within the jurisdiction the Income-tax Officer for Motihari. The Income-tax Officer refused further time, but Narain Ram refused to sign the order sheet acknowledging the order fearing, as he said, that he would lose his service. Then on the 30th of September an assessment was made summarily under section 23, sub-section (4).

The application under section 27 was made for re-opening the assessment and then they sought to excuse themselves for not having filed a return by pleading that Narain Ram had been ill and had failed to communicate the receipt of the notice under section 22 (2) to them and that they had been absent at the time on business and they said that the failure to make a return was not deliberate. The Income-tax Officer would not accept the plea, and there was an appeal to the Assistant Commissioner of Income-tax, and in the petition to the Assistant Commissioner the assessees pleaded that they had not been informed of the receipt of the notice by Narain Ram. But at the hearing of the appeal learned Counsel on behalf of the assessees took the additional ground that the service under section 22, (2) was not valid because no written authority had been given to Narain Ram by the assessees to accept service. Under the direction of the High Court the Commissioner stated the following questions:—(a) "Whether or not notices under section 22 are to be served personally on the assessees," and (b) "Whether the said notice served on a servant who is not authorised on that behalf was validly served."

The Commissioner, however, went on to state that it had been found as a fact by the Assistant Commissioner that Narain Ram was in fact authorised to accept the notice for the year in question and he recited the evidence upon which the finding was arrived at. But Mr. Jayaswal on behalf of the assessees has raised this point. He says first that notwithstanding the finding of fact the Income-tax law demands that the service of a notice under section 22, (2) of the Income-tax Act must be personal and that there is no provision for what he terms vicarious service. He relies for that purpose on section 63, sub-section (1) of the Income-tax Act which is as follows:—"A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908," and he relies also on section 22 (2) which contains the words "to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him" and contends that the effect of reading these two sections combined is that section 63, although it does in fact permit notice by post and although it permits the service of notice as if it were a summons under the Code of Civil Procedure, is limited to personal service unless the alternative of service by post is adopted.

For the purpose of deciding whether that view is right it is necessary to turn to the Code of Civil Procedure and the Orders made under it in order to ascertain what are the provisions for the service of summons under that Code. Now Order 5 Rule 12, that is section 75 of the earlier Code, says "Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." The argument of Mr. Jayaswal amounts to this that in applying the provisions of Order 5 Rule 12 one must ignore everything except the provision for service in person. To take that view would stultify the reference to the provisions for service of summons under the Code of Civil Procedure.

Now the second point raised is this. It is pointed out that Order 3 Rule 2, which in my opinion only deals with the circumstances in which the positive act of an agent is to be attributed to the principal, provides that the acts by the agents of parties bind the parties in two cases: (a) when the person holds a power-of-attorney, authorizing him to make and do such appearances, applications and acts on behalf of such parties. It is of course not contended in this case that the agent was authorised by a power-of-attorney or otherwise as provided by paragraph (a); but paragraph (b) states that the act of the agent is also to bind the principal if in the case of the principal's absence from the local limits of the jurisdiction of the Court the agent carries on trade or business in his name, provided that no other agent was expressly authorised to do the acts. In that

case also the act of the person so carrying on trade or business in the name of the principal is to bind the principal. Rule 13 of Order 5 deals with the case in which service upon an agent is to be deemed service upon the principal out of the jurisdiction and provides that "In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service." That is to say, there are two rules which deal with the way in which persons outside the jurisdiction can be affected by the acts of their agents.

Order III rule 2 deals with the way in which they are to be bound by the positive acts of the agent, and Order 5 Rule 13 provides that they are to be bound by acceptance of service by the agent. Both of those rules deal only with the case of persons outside the jurisdiction. Order III Rule 3, however, deals with the case of service of process in all circumstances and says firstly that "Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs," and sub-rule (2) says that "The provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent." Now in this case the finding is most distinct that this is a case of a business being carried on and there is a finding that the person who in fact accepted service is the recognised agent of the principal. There has been a contention that the provision of Order III sub-rule (2) limits the liability of the principal for acts of recognised agents only to cases in which the principal is a resident outside the limits of the jurisdiction, but to my mind that argument is not tenable. In the first place Order III Rule 2 is only dealing with the specific liability of a principal who is resident outside the jurisdiction for the positive acts, that is to say, "appearances, applications and acts," performed by his agent. It does not deal with the liability of the principal to be bound by the acceptance of service by the agent; and if in the case of a business, where the business is carried on in the name of the principal by somebody, then whether that principal is or is not resident within the local jurisdiction, in my opinion the service upon the recognised agent is good service upon him. That point however, is not vitally material to the decision of this case, although it has been argued because the finding of fact in this case is that the agent was authorised to accept income-tax notices. As I have said, the finding is fully justified.

But it is necessary for the consideration of the second question in its present form "whether the said notice served on a servant who was not authorised in that behalf was validly served." That question, which it is said would seem, having regard to the finding of fact, to be unnecessary in the case, was directed to be formulated by the Court and that is why I have referred to these considerations. If the authority can be implied from the nature of the work carried on by the agent on behalf of his principal it is good service and in the case of a recognised agent carrying on business in the name of the principal that would to my mind imply authority to accept notices of this kind, because the acceptance of notice is a matter which is connected with such trade or business.

I would therefore answer the first question in the negative, and the second question in view of the finding of fact does not arise. The assessees will pay Rs. 200 as costs.

JAMES, J. :—I agree

(409) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

(5th December, 1930)

Batuk Prasad Khatri, Rai Bahadur .. *Assessee.*

v.

The Commissioner of Income-tax, United Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), *Secs.* 28, 34, 58 *and* 66 (2)—*Assessment completed—Subsequent proceedings for concealment of income—Jurisdiction to impose penalty in respect of income-tax and super-tax avoided—Assessment order itself levying penalty, Legality of—Point not referred by Commissioner, raising of.*

Where subsequent to the making of an assessment proceedings are taken under Sec. 34 *of the Income-tax Act, an Income-tax Officer has jurisdiction to levy a penalty under Sec.* 28 *of the Act in respect of income-tax avoided by the assessee by concealment of income but not in respect of super-tax so avoided.*

An Income-tax Officer passing an order of re-assessment under Sec. 34 *of the Act can direct therein the imposition of a penalty under Sec.* 28, *the notice under Sec.* 28, *proviso not being required to be issued only after the order of re-assessment. The High Court allowed this point to be argued though not referred by the Commissioner under Sec.* 66 (2) *of the Act.*

Case [Civil Miscellaneous Case No. 433 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the High Court.

CASE.

Rai Bahadur Batuk Prasad Khattri of Gola Gali, Benares, was for the year 1927-28 assessed to income-tax on a total income of Rs. 72,380. The assessment was made on February 27, 1928.

2. Subsequently the Income-tax Officer received information which caused him to believe that some income of the applicant had escaped assessment. Accordingly on March 15, 1929, he served the applicant with notice under section 34 read with section 22 (2). This notice required him to furnish a return setting forth his income from all sources chargeable to income-tax during the year ending March 31, 1928.

3. On April 20, 1929 the applicant furnished the return and showed Rs. 72,380 as his total income, *i.e.*, the exact figure on which he had already been assessed to income-tax.

4. Subsequently the applicant was induced to produce his books in which his real accounts were kept and from this the Income-tax Officer found his total income in the period in question to have been Rs. 2,92,952. Accordingly the applicant was assessed to income-tax, Rs. 27,265-13-0 and to super-tax Rs. 28,366—total Rs. 55,631-13-0. Out of this sum the applicant had already been assessed to a tax of Rs. 6,635-3-0. Thus the additional tax imposed was Rs. 48,996-10-0 of which Rs. 20,630-10-0 was income-tax and Rs. 28,366 was super-tax; and these were accordingly the amounts of income-tax and super-tax which would have been avoided if the income returned by the assessee had been accepted as correct.

5. The Income-tax Officer at the same time took up the question of imposing a penalty under section 28. On December 16, 1929 he issued a notice on the applicant requiring him to show cause on December 19, 1929 as to why a penalty under section 28 should not be imposed. On December 18, the applicant

presented a petition pleading for exemption from the penalty. The Income-tax Officer refused to accept the applicant's plea and imposed a penalty of Rs. 40,000 of which Rs. 20,000 was imposed in the assessment of income-tax and Rs. 20,000 in the assessment of super-tax.

6. The applicant appealed to the Assistant Commissioner who rejected the appeal. Copies of the appeal and of the Assistant Commissioner's order will be found in Appendices D* and E.*

7. The applicant has applied that the following questions may be referred to the High Court:—

(1) Has the Income-tax Officer jurisdiction to impose penalty in the matter of income-tax in proceedings for assessment taken under section 34 of the Income-tax Act?

(2) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case?

(3) Was the opinion of the Assistant Commissioner of Income-tax on the points of law raised before him correct?

8. The third point is entirely vague and the Commissioner refuses to state any question in connection therewith.

9. The questions of law raised in the first two questions are in the opinion of the Commissioner better stated in the following question:—

Was the imposition of a penalty of Rs. 40,000 under section 28 legal—Rs. 20,000 being imposed in the assessment of income-tax and Rs. 20,000 in the assessment of super-tax?

10. In the opinion of the Commissioner the answer to this question is in the affirmative having regard to the provisions of section 34 and section 58 (1) of the Income-tax Act.

JUDGMENT.

This is a reference by the Income-tax Commissioner of two points:—(1) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of income-tax in proceedings for assessment taken under section 34 of the Income-tax Act? (2) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case? The facts as found by the Income-tax Commissioner are that a certain assessee has made a return of income-tax and had been assessed on February 27, 1928, and subsequently on March 25, 1929 a notice was issued under section 34 read with section 22 (2) of the Indian Income-tax Act requiring the assessee to furnish a return and on April 20, 1929 the applicant furnished the return showing the same figure Rs. 72,380 as his total income. This was the same figure which he had previously returned as is admitted before us. Subsequently the applicant's books were produced and his total income was found to have been Rs. 2,92,952 for the year in question. Accordingly the applicant was assessed to income-tax amounting to Rs. 27,265-13-0 and to super-tax Rs. 28,366. In addition to these assessments a penalty of Rs. 20,000 for income-tax and Rs. 20,000 for super-tax was imposed on the assessee under the provisions of section 28.

* Not Printed.

The first question referred to us is whether the Income-tax Officer could impose the penalty of Rs. 20,000 under section 28 of the Income-tax Act in regard to the assessment of income-tax which he found to have been under-assessed by Rs. 27,265-13-0 less the original assessment of Rs. 6,635-3-0. The argument of the learned counsel for the assessee is to the effect that the penalty under section 28 can only be imposed in the course of the original assessment proceedings, and that it cannot be imposed when the original assessment has been made and when further proceedings have been taken at a later date under section 34 of the Indian Income-tax Act. The argument is based on the fact that section 28 does not refer to section 34. But that section 28 does begin as follows:—"If the Income-tax Officer.....in the course of *any proceedings* under this Act is satisfied that an assessee has concealed the particulars of his income." This shows that section 28 is not merely intended by the Act to apply to an assessment under the proceding sections but that it may refer to any preceeding whatever under the Income-tax Act. Now section 34 is a section which lays down proceedings under the Income-tax Act and accordingly proceedings under section 34 are proceedings in the course of which section 28 may be applied.

Further section 34 itself states that under that section there may be a notice under sub-section (2) of section 22 "and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub-section." Thus section 34 also shows that proceedings taken under it follow the routine laid down by chapter IV for the original assessment of income to income-tax, and that section 28 which is a part of that procedure will also apply to the re-assessment proceedings under section 34. We therefore answer the first question in the affirmative.

The second question is:—"Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case?" As stated already the Income-tax Officer imposed a penalty of Rs. 20,000 in regard to super-tax as well as the penalty of Rs. 20,000 in regard to income-tax and he purported to impose this penalty for super-tax under the provisions of section 28. Now for the Crown the argument as to the jurisdiction of the Income-tax Officer to impose this penalty for super-tax is stated as follows. Chapter IX of the Indian Income-tax Act deals with super-tax, and it states that super-tax is "an additional duty of income-tax (in this Act referred to as super-tax)." Section 58 (1) of that Chapter is as follows:—"All the provisions of this Act, except section 3, the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14, the sections 15, 17, 18, 19, 20, 21 and 48 shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax."

Now it is argued for the Crown that section 28 is not one of the sections of the Act exempted from application to super-tax. On the other hand the learned counsel for the assessee pointed out that the provisions of the Act are by section 58 (1) only to apply "so far as may be, to the charge, assessment, collection and recovery of super-tax." There is nothing stated in regard to penalties. It was argued that penalty would come under the heading of assessment and no doubt section 28 does come in Chapter IV which is headed "deduction and assessment." But if that argument were accepted, then we would point to Chapter VI which is headed 'Recovery of Tax and Penalties,' where section 47 states that any sum imposed by way of penalty under section 28 may be recovered in the manner provided by that Chapter for the recovery of arrear of tax. If therefore the argument were sound that section 28 applied because Chapter IV is headed "deductions and assessment," then the situation would be that the Income-tax authorities

could impose a penalty in regard to super-tax but could not recover that penalty. It is clear that the legislature could not have had such an intention.

Now we consider that a section in regard to a penalty such as section 28 must be strictly construed. The section states that "he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of *income-tax* which would have been avoided if the income so returned by the assessee had been accepted as the correct income." There is no word whatever in this section in regard to super-tax. If the legislature had intended that super-tax should also involve a penalty, we consider that the legislature would have clearly specified in this section "in addition to the income-tax or super-tax if any payable by him." But in the absence of such precise words in the section we do not consider that the meaning should be read into this section by way of implication from section 58 (1) and section 55.

The learned Government Advocate further referred to the fact that Act XI of 1922 is known by the title of "Indian Income-tax Act." But the correct title of the Act is "an Act to consolidate and amend the law relating to income-tax and super-tax.' The very title of the Act therefore observes the distinction to be drawn between income-tax and super-tax. Further in section 2 of the Act there is no definition of income-tax as including super-tax. And the definition in section 55 that super-tax is an additional duty of income-tax also adds "in this Act referred to as super-tax." The Act therefore carefully states in section 55 that super-tax is referred to in the Act as super-tax. It would therefore not be correct to read the word "income-tax" in section 28 as including super-tax unless it were clearly laid down in section 58 (1) that the provisions of the Act in regard to penalties would apply to super-tax. Accordingly we answer the second question in the negative.

In argument before us a third point was raised in regard to procedure. We may observe at once that this point was not referred to us under section 66 of the Income-tax Act. The point was that on 15th March 1929 the Income-tax Officer issued a notice to the assessee for re-assessment under section 34. On 16th December, 1929 having examined the books of the assessee he issued a further notice to the assessee to show cause on the 19th December why a penalty should not be imposed on the assessee under section 28. On the 21st December, 1929 the Income-tax Officer passed an order for re-assessment and also in the same order he directed that the assessee should pay a penalty under section 28.

Now the point taken for the assessee is that section 28 states that if the Income-tax Officer is satisfied *that an assessee has concealed the particulars of his income he may impose a penalty.* From these words it is argued that the order of re-assessment should have been made first and then a notice should have issued to the assessee to show cause why a penalty should not be imposed on him. There is nothing whatever in section 28 to indicate that this procedure is necessary. We consider that the requirements of section 28 were fulfilled when on 21st December, 1929 the Income-tax Officer was satisfied that the assessee had concealed his income and he thereupon proceeded to impose the penalty under that section. The notice was only issued in compliance with the proviso in that section and that proviso does not say that the Income-tax Officer should be so satisfied when he issues the notice. We consider therefore that there was no defect in procedure and further it is not alleged that the assessee was in any way prejudiced by the procedure adopted. As the reference has been decided to an equal extent in the affirmative and in the negative, we direct that the parties shall pay their own costs. The learned Government Advocate states that he is entitled to a fee of Rs. 250 and we direct that that amount be taken as his fee.

(410) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

(8th December, 1930).

Seth Gangasagar, Rai Bahadur *Assessee.*

The Commissioner of Income-tax, United Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 22 (4), 23 (3) and (4) and 66 (2)—Non-production of some accounts called for—Assessment based wholly on accounts produced—Assessment, if under Sec. 23 (4)—'Require' in Sec. 22 (4), meaning of—Reference application without specifying questions—Commissioner referring a question of fact—High Court deciding real question of law.

Where after the submission of a return of income of the account year S. 1984-1985 an assessment was made wholly on the basis of account books produced but the Income-tax Officer declared the assessment to be one under Sec. 23 (4) of the Income-tax Act for default in the production of account books of S. 1981-1982 called for by a notice under Sec. 22 (4) of the Act,

HELD, that as no income was stated as concealed by non-production of accounts for 1981-1982, those accounts could not be said to be 'required' by the Income-tax Officer within the meaning of Sec. 22 (4) and consequently the assessment must be treated as one made under Sec. 23 (3) of the Act.

The word 'require' in Sec. 22 (4) really means require as a piece of relevant evidence.

Where on an assessee's application under Sec. 66 (2) of the Act not specifying questions of law for reference, the Commissioner stated a case referring a question of fact as the only question arising in the case, the High Court framed the question of law properly arising in the case and gave its opinion thereon.

Case [Miscellaneous Case No. 564 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

CASE.

1. The assessee is Rai Bahadur Seth Gangasagar of Khurja.

2. The assessment in question was for the year 1929-30. The "previous year" was the Sambat year, Diwali 1984 to Diwali 1985.

3. The Income-tax Officer called for the account books for 1984-85, and again for those for 1981-82, 1982-83, 1983-84 as under the proviso to sub-section (4) of section 22 of the Indian Income-tax Act he was entitled to do.

4. The assessee failed to produce the account books for 1981-82, sticking to the story he had given previously and declaring that they had been lost.

5. The Income-tax Officer refused to believe this story and holding that there had been a default in complying with a notice issued under section 22 (4), made the assessment under section 23 (4).

6. The assessee applied for cancellation of the assessment under section 27. His application was rejected. He appealed to the Assistant Commissioner, and his appeal also was rejected.

7. He has now applied under section 66 (2) that the case be referred to the High Court, but has not stated the questions of law which in his opinion arise out of the Assistant Commissioner's appellate order.

8. It is doul ful whether any question of law does arise. If any question does arise it is the following question:—"Whether the findings of the Income-tax Officer and the Assistant Commissioner that the assessee could have produced the account books for 1981-82, had he been so minded, were legally valid findings."

9. The grounds for these findings will appear from the Income-tax Officer's assessment order, his order under section 27, and from the Assistant Commissioner's appellate order.

10. In those orders reference is made to the criminal case against the assessee. Copies of the complaint and of the Magistrate's judgment are accordingly annexed (Appendices E* and F*). It will be observed that though in the complaint the statement that the books for 1981-82 had been lost is cited as a false statement punishable under section 193, I.P.C., the judgment contains no reference to the point.

OPINION.

In the opinion of the Commissioner the answer to the question is in the affirmative.

JUDGMENT.

This is a reference by the Income-tax Commissioner under section 66 (2) of the Indian Income-tax Act made at the instance of one Seth Gangasagar.

The facts leading to this reference, briefly, are these. Seth Gangasagar was directed to produce his books in respect of his income for the "previous year" which commenced in Diwali 1984 and went up to the Diwali of 1985. He produced his account books, but failed to produce the account book of the year 1981 to 1982. He also failed to produce the account books of a certain firm known as Jogiram Janki Prasad. The Income-tax Officer, Mr. Dhown, looked into the accounts submitted, calculated the income, allowed certain deductions, disallowed others and ultimately found that the total income which was taxable came to Rs. 7,00,000 and odd. He calculated the income-tax and the super-tax and declared that net amount to Rs. 196,933-12-0. Having said so, the learned Officer made the following remarks:—"The assessment is wholly based on accounts, but

*Not Printed.

is made under section 23 (4) of the Income-tax Act for the assessee's failure to comply with all the terms of the notice under section 22 (4) in that the following accounts were deliberately withheld by the assessee, which according to general reputation the Rai Bahadur has got and which he could produce....."

The assessee Seth Gangasagar thereupon filed an application under section 27 of the Income-tax Act before the same learned Officer. It was disallowed and then the assessee went up in appeal to the Assistant Commissioner of Income-tax. The appeal was under section 31 of the Income-tax Act. The appellate Officer found that the assessee had really got in his possession the account books of the year 1981 to 1982 and had deliberately concealed them. As regards the other account books, he came to the conclusion that they were not in the assessee's possession. Then he considered the question whether the account books of the year 1981 to 1982 were relevant to the enquiry or not. He remarked; "The third point raises the question whether the books of account for the year 1981 to 1982 could be relevant to the assessment for the year 1929 to 1930. I think this question is not very material. An Income-tax Officer acts within his powers when he calls for the books of account of an assessee for three years prior to the year under assessment, which he is authorised to do under section 22 (4) of the Income-tax Act."

In the result, the appeal was dismissed. Thereupon Seth Gangasagar made an application to the Income-tax Commissioner, as already stated, to state a case for the consideration of the High Court. In the application, the assessee said, "The view of law taken by the Income-tax Officer and the Assistant Commissioner of Income-tax that the assessment should be made under section 23, clause 4 of the Indian Income-tax Act, is incorrect, among others, for the following reasons....." We take it that the point of law that Seth Gangasagar wanted to raise was whether, in the circumstances of the case, the assessment should be deemed to have been properly made under section 23 (4) or whether it should have been treated as having been made under section 23 (3) of the same Act.

The Commissioner of Income-tax thought that the petition of Seth Gangasagar did not raise any point of law at all and if any question did arise, it was the following *viz.*, "Whether the findings of the Income-tax Officer and the Assistant Commissioner that the assessee could have produced the account books for the year 1981 to 1982, had he been so minded, were legally valid findings?."

The question as framed was a question of fact pure and simple and the High Court could not give any answer to such a question.

It has however been held in this Court in *Shiva Prasad Gupta* v. *Commissioner of Income-tax, U.P.* (1) that when a case has been stated before the High Court by the Commissioner, the High Court can look into the facts and resettle the issues, as it were, and decide the issues of law that properly arose on the statement. The fact, therefore, that the Commissioner of Income-tax misunderstood the petition made before him and failed to formulate the only point of law that arose on the petition and on the decision of the Assistant Commissioner of Income-tax, does not preclude this Court from framing the issue of law that arose and to decide it. As stated above, the issue of law that arose in this case is as follows:—"Whether in the circumstances of this case, the Income-tax Officer was right in calling his assessment an assesment under section 23 (4) of

(1) 8 I. T. C. 406.

the Act, or whether in law the assessment was one under section 23 (3) of the Act and whether in the latter case the assessee had a right of appeal in the regular way?"

Now we come to facts of the case. It appears that Seth Gangasagar was in the habit of submitting a statement of his income. For sometime, the Income-tax Officer accepted his statement, but later Seth Gangasagar discontinued submitting the statement of his income. When he was required to state his income in a later year, he submitted a statement which was found to have been false and it materially concealed his income. He was prosecuted and convicted for concealment of his income and he was assessed to the best of judgment by the then Income-tax Officer for the year 1927 to 1928. In that year, *i.e.*, during the assessment for the year 1927 to 1928, a controversy arose as to whether the account books of the year 1981 to 1982 were in the possession of the assessee or not. The assessee asserted that the books had been lost in transit between Bombay and Khurja, but his statement was not believed. This statement formed the subject-matter of a criminal prosecution, but no charge was framed and no conviction was obtained.

In the following year, namely 1928 to 1929, the assessee was again called upon to produce among other documents the account books for the year 1981 to 1982. He re-asserted what he had stated before, that the books were not in his possession or power and that they had been lost. His statement was disbelieved, and for the second time, an assessment to the best of the Income-tax Officer's judgment was made. We are now concerned with the third year, namely 1929 to 1930. In this year again, for the third time, the assessee has been asked to produce his account books of the year 1981 to 1982. The Sambat year 1981 to 1982 would correspond to the English year 1925 to 1926. The assessee again protested that his account books had been lost. This statement has again been disbelieved. The Income-tax Officer, as already stated, based his assessment on the actual entries in the other books produced by the assessee and made his assessment. He did not believe that there was any extra income on which the assessee should have been assessed and that such income could have been discovered by the production of the books of the year 1981 to 1982. We have already quoted from the order of the Income-tax Officer. He said that his assessment was wholly based on accounts. But he thought that because the assessee had failed to produce the books for the year 1981 to 1982 the assessment should be treated as one under section 23 (4) of the Income-tax Act.

The assessee's contention is that the books which were not forthcoming, namely of the year 1981 to 1982, were not required for the purposes of assessment and he should not have been called upon to produce them and that in any case, his statement that the books were lost, should have been believed. We are not in a position to say whether the books are actually in the possession of the assessee or whether they are lost, but we think that there is a good deal of strength in the contention that the books for the year 1981 to 1982 were not 'required' within the meaning of section 22 (4) of the Indian Income-tax Act. An Income-tax Officer is entitled to call for documents which in his opinion would furnish him with relevant material for assessment of tax. The sub-section 4 of section 22 runs as follows:—"The Income-tax Officer may serve.....on any person upon whom a notice has been served under sub-section 2 a notice requiring him .....to produce.....such accounts or documents as the Income-tax Officer may *require*."

The word "require" really means require as a piece of relevant evidence. The word "require" does not mean that the Income-tax Officer should ask for

documents or account books which he does not think to be relevant at all. We have more than once pointed out the fact that the actual assessment was made on the account books which were actually produced before the Income-tax Officer. He did not say in his order that he guessed that any profit had been concealed by putting away the account books of the year 1981 to 1982. For the purposes of assessment therefore, the books of the year 1981 to 1982 were not "required." In the circumstances, the question arises, whether the assessment is really under sub-section 4, section 23, or it is really under section 23, sub-section 3.

If we look to the principle on which the two sub-sections of section 23 are based, we shall at once see why the two rules are different. Where the Income-tax Officer does not get proper material on which to find out the true income of an assessee, it is in the interest of the State to guess the income of the assessee. The assessee cannot complain that he has been over-taxed, if owing to his own failure, the Income-tax Officer is not able to do justice towards him. It is the assessee who is in default and he has no right to complain. But where the proper materials are before the Income-tax Officer, he would utilise them and make an assessment under section 23 (3), which assessment would be liable to be re-examined by the appellate Officer. When an assessment is made by the Income-tax Officer more or less on matters which have been guessed out, there cannot be any proper appeal to an appellate Court. The Income-tax Officer does very often possess extraneous information as to the income of a man and if he thinks that the assessee's proper income is at a certain figure, it is but right that his judgment should be final and there should be no appeal. There would be no sense in substituting the Income-tax Officer's "guess" by his superior Officer's "guess". It is on this principle that an appeal is shut out in the case of what has been called "Best Judgment assessment". It is true that all these reasons are not to be found within the four corners of the Indian Income-tax Act, but one can easily see the reason for the rule.

If we are right in thinking that this is the principle on which the two rules, namely sub-section 3 and sub-section 4 of section 23 are framed, we can have no hesitation in coming to the conclusion that the assessment made in this particular case should not have been declared to have been an assessment under section 23 (4). It should have been treated as an assessment under section 23 (3). This therefore is our answer to the question which we have ourselves formulated.

As the applicant has succeeded entirely, we direct that he shall get his costs from the Government. We assess the fees payable to the learned Government Advocate at Rs. 200. Let a copy of this judgment, under the seal of the Court be sent to the Commissioner of Income-tax. The Government Advocate is allowed a month's time within which to file a certificate of payment to him.

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(411) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice
Justice Sir C. C. Ghose Kt., and Mr. Justice Buckland.

(9th December, 1930.)

Shewdayal Jagannath Jagannath Binjraj, Firm — *Assessees.**

v.

The Commissioner of Income-tax, Bengal — *Referring Officer*

Indian Income-tax Act (XI of 1922), Sec. 10 (2) (vii)—Old and worn out machinery—Sale on account of unprofitable working—Obsolescence allowance, if claimable—Obsolete, definition of.

Under Sec. 10 (2) (vii) of the Income-tax Act obsolescence allowance cannot be claimed in respect of machinery scrapped and sold because being old and worn out it could not be worked at a profit in the face of competition.

Definition of "obsolete" in Ratan Singh *v.* The Commissioner of Income-tax Madras, *2. I.T.C. 108, Adopted.*

Case stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The question of law, hereinafter stated, which is being referred for the decision of the Hon'ble High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922), arises out of the assessment for 1929-30 of Messrs. Shewdayal Jagannath Jagannath Binjraj, an unregistered firm, hereinafter termed "the assessees". The assessment was made on the income of the previous year Ramnavami 1985.

2. The facts are as follows. The assessees carry on business of several kinds in several places. In the year Ramnavami 1983 they purchased some secondhand machinery and started an oil mill in Calcutta. In their assessment for the year of assessment 1928-29, being on the profits of the previous year 1984 Ramnavami, they claimed a loss on the working of the oil mill amounting to Rs. 35,409. The Income-tax Officer allowed the loss after deducting inadmissible bad debts amounting to Rs. 7,511, as well as depreciation debited in the books amounting to Rs. 3,280. He allowed no depreciation according to the scale prescribed in the Statutory Rules for the reason that no proper claim had been put in as required by the Statutory Rules. In the assessment note the Income-tax Officer recorded the following remarks. "The business has been closed down owing to heavy losses. The loss is said to be due to unfair competition between the manufacturers." In the assessment for 1929-30, being on the profits of the previous year 1985 Ramnavami, the oil mill was not worked, but the assessees showed a loss of Rs. 21,962 in the "Calcutta Mill account". Of that amount Rs. 9,333 was claimed as obsolescence allowance under section 10 (2) (*vii*) of the Indian Income-tax Act (XI of 1922), being the difference between the original cost

* (1931) 35 C. W. N. 314; A. I. R. (1931) Cal. 599.

of certain parts of the machinery and the amount obtained by the sale of those parts within the previous year. The claim was disallowed by the Income-tax Officer on the following grounds, as set out in the assessment note. "The assessees purchased some secondhand machinery at the end of 1983 Ramnavami. By using the same in 1984, they incurred loss and sold off parts in 1984, and the balance of about Rs. 10,000 still remains unsold. The loss is due to the fact that the machineries were worn out by previous use for years. The machineries were sold not because they were obsolete, but because they were worn out already, and the working expenses were heavy in comparison with new machines. These facts the assessees learnt after working them only for a few months. This loss cannot come under obsolescence, but must be considered as a capital loss." The Assistant Commissioner upheld the disallowance in appeal, whereat the assessees made an application under section 66 (2).

3. At the hearing of that application the assessees gave me an account of the matter differing from the account given to either Income-tax Officer. They explained that the whole of the machinery had been sold in 1985, whereas, before the Income-tax Officer, it had been stated that part only of the machinery had been sold. They further represented that the oil mill had not been completely closed down, but that the fact was that the machinery had been scrapped partly because it was worn out and partly because a new invention in Germany had rendered it obsolete; further that fresh machinery had actually been ordered. No proof, however, of the order for fresh machinery was adduced, and it was admitted that the new German machine had been invented some two or three years before the machinery had been originally purchased.

4. These subsequent submissions are not evidence, and, in any case, cannot be accorded credit. Clearly the assessees must be held to the account given to the assessing officers.

5. I therefore find that the facts are that the machinery was not scrapped because it was obsolete, but the business of the oil mill closed down in the year preceding the previous year for the reason that the machinery, being old and worn, could not be worked at a profit in the face of competition.

6. The assessees have required me to refer the following questions to the Hon'ble High Court.

(a) "Whether the findings arrived at by the learned Income-tax Officer were sufficient in law to support the order disallowing your petitioners' claim for the loss from the obsolescence of machineries.

(*b*) What is the legal significance of the term "obsolete"? Has it been rightly interpreted by the learned Income-tax Officer and the learned Assistant Commissioner?"

7. Neither question appears to me clearly put. The real question of law which appears to me to arise out of the facts is this, "Was the claim for obsolescence allowance rightly disallowed?" This question is therefore referred.

8. My opinion is that the term "obsolete" in section 10 (2) (*vii*) of the Act must be interpreted strictly, and that, on the facts found in paragraph 5 above, the answer to the question is in the affirmative.

H. N. Bhattacharji, for the Assessees.

N. N. Sircar, (Advocate General) and *Radha Binode Pal*, for the Crown.

JUDGMENT.

RANKIN, C. J.:—In this case the assessees claim to be entitled to the allowance authorised by section 10 (2) (*vii*) of the Income-tax Act: "in respect of any machinery or plant which in consequence of its having become obsolete has been sold or discarded". The Commissioner for Income-tax has disallowed the claim and has stated a case for the opinion of the Court upon the question: "Was the claim for obsolescence allowance rightly disallowed?"

It appears that the assessees purchased some old machinery and started an oil mill in Calcutta just before the beginning of the year 1927-28 being Ramnavami year 1984. It was however worked at a loss and the oil mill was accordingly closed down in that year, some parts of the machinery being sold and the remainder scrapped. The present question arises out of the assessment for 1929-30 which has been based upon the income of the previous year, namely, Ramnavami 1985. The finding of the Commissioner is to the effect that the business of the oil mill closed down in 1984 for the reason that the machinery being old and worn could not be worked at a profit in the face of competition, and he takes the view accordingly that the machinery was not scrapped because it was obsolete but because it was worn out with the result that the working expenses were heavy in comparison with new machines. He has negatived the suggestion that new inventions or the employment of newer types of machinery were any part of the reasons for which the oil mills were closed down.

In these circumstances, it appears to me that, unless we are to hold that the obsolescence allowance is claimable whenever machinery has become worn out and is sold or discarded for that reason, the assessees cannot succeed. The allowance given by clause (*vii*) of sub-section 2 of section 10 of the Act, is to be read with the allowance for depreciation given by clause (*vi*). Both are exceptions made by the statute to the general principle that so far as the fixed capital of a business is concerned, appreciation or depreciation do not enter into the computation of profits. *Prima facie* the proper heading under which provision is made for the loss in value occasioned by wear and tear or continuous user is the heading "depreciation". The statute recognizes however that machinery and plant may have to be discarded not because it has come to the end of its working "life" but by reason that newer types of machinery or newer methods have become necessary in the face of competition. Even if it is good of its kind, obsolescence allowance comes into play in such a case; but it is another matter altogether to hold that whenever a machine becomes worn out and it is seen that the aggregate of the allowances made for depreciation has not exhausted its original cost, allowance for obsolescence can be claimed in respect of the balance.

In the case of *Rathan Singh*, v. *The Commissioner of Income-tax, Madras*,[1] the Madras High Court held as follows:—" 'Obsolete' as applied to machinery means machinery which has got out of date because it has been superseded by later machinery more suitable to its purpose and therefore although able to perform its functions it is not, in common parlance,

(1) 2 I. T. C. 108.

sufficiently up-to-date to make it machinery that a prudent man would continue to use, but machinery which he would replace as being, in the ordinary meaning of the term, 'obsolete' ". Now, there is always a certain danger in committing one's self to a definition, but for the purposes of the present case, this exposition is, I think, correct and sufficient. It is not possible for us to hold that the Commissioner of Income-tax, upon the findings of fact at which he arrived, was obliged in law to permit the assessees to make the deduction which they claim. We may say here what Rowlatt J. said in *South Metropolitan Gas Co.*, v. *Dadd*[2]. "It quite clearly is a question of degree, and a question of fact, when machinery becomes obsolete, and I cannot see any evidence that Commissioners have not addressed their minds to a proper question". The question referred to us must be answered in the affirmative and the assessees must pay the costs of the reference.

GHOSE J.:—I agree.

BUCKLAND J.:—I agree.

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(412) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice,
Justice Sir C. C. Ghose, Kt. and Mr. Justice Buckland.

(10th December, 1930.)

Ramlal Murlidhar .. *Assessee.*

v.

The Commissioner of Income-tax, Bengal .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 2 (14) and Registration Rules—Partnership agreement signed by some partners only—If registrable—Incomplete instrument requiring supplementation—Validity for registration—Scope of Registration Rules.

Where under an instrument of partnership signed by three persons, the executants after stating that they together with the mother of one of them were carrying on a business in partnership agreed that the partnership business should continue, the profits or loss to be divided in certain shares, the lady to have one twentieth share and an application to register it under Sec. 2 (14) of the Income-tax Act was refused on the ground that the instrument not having been executed by the lady was not one contemplated under that section,

HELD, that if the instrument had been assented to by the lady and had been put forward by her along with the other partners for registration, it was admissible for registration under Sec. 2 (14) of the Act.

Sec. 2 (14) of the Act and the Rules thereunder do not imply that a complete instrument only is valid for registration, that is, an instrument not requiring supplementation by other evidence but solely operating and containing in itself the complete agreement constituting the partnership.

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(2) 13 Tax Cas. 205 at page 211.

Case [Civil Reference No. 13 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The question of law, hereinafter stated, which is being referred for the decision of the Hon'ble High Court under sub-section (2) of section 66 of the Indian Income-tax Act (XI of 1922), arises out of the assessment of Messrs. Ramlal Murlidhar, hereinafter referred to as "the assessees", for the year of assessment, 1929-30.

2. The facts are as follows:—The assessees are a firm consisting of four partners. They applied to the Income-tax Officer, under sub-section (14) of section 2 of the Indian Income-tax Act read with Rules 2 and 3 of the Rules framed thereunder, for the registration of their firm. In support of their application they tendered a registered document purporting to be the instrument of partnership under which the firm was constituted, but executed by three only of the four partners of the firm. The fourth partner was no party to the document nor was any letter or document produced which signified his acceptance of its terms. The Income-tax Officer refused the application on the ground that the socalled instrument of partnership was in the words used by him, "incomplete for operation". In appeal the Assistant Commissioner upheld the decision of the Income-tax Officer, whereat the assessees required me to state a case.

3. The questions of law arising were framed by the assessees as follows:—

(*a*) Whether the Income-tax Officer has any jurisdiction in law to refuse an application under section 2 (14) made in the prescribed manner prior to assessment when the constitution of the firm was in accordance with the instrument of partnership.

(*b*) Whether or not an agreement of partnership executed by three out of four partners of a firm and registered under the Indian Registration Act embodying the terms and conditions of the partnership which was given effect to by all the four partners is a valid and legal document.

4. Question (*a*) begs the issue by assuming that the document in question was an instrument of partnership within the meaning of sub-section 14 of section 2 of the Act. I do not therefore refer this question.

5. The querry in Question (*b*), *viz.*, whether the document was a valid and legal document, likewise misses the issue. The document might be valid for certain purposes without being valid for the purposes of the above sub-section. I therefore omit Question (*b*) also from the reference.

6. The question of law which appears to me to arise out of the facts is this:—"Whether a document, registered under the Indian Registration Act, purporting to contain the terms of a partnership, can be said to be an instrument of partnership under which the firm is constituted within the meaning of sub-section (14) of section 2 of the Indian Income-tax Act and Rule 2 of the Rules thereunder, when such a document has been executed by three only of the four partners in the firm and when no document showing acceptance

by the fourth partner in the terms contained therein is forthcoming". This question is therefore referred.

7. My opinion is as follows:—A partnership, to be valid, does not require its terms to be embodied in an instrument. Moreover, a defective instrument may be supplemented by other evidence, such as conduct of the partners, to establish and define those terms. But the Indian Income-tax Act and the Rules framed thereunder make provision for the registration of those firms only that are constituted under instruments of partnership and of no other firms. It is implied, in my opinion, that a complete instrument only was intended to be valid for registration, that is to say, an instrument which does not require supplementation by other evidence, but contains in itself the complete agreement constituting the partnership and by itself solely operates to create the partnership. I do not mean to say that an instrument of partnership must consist of one document only. In this case, had the fourth partner signified in writing his acceptance of the terms of partnership, the two documents together might have been held to constitute a complete instrument of partnership. But an instrument must consist of a document or documents, and, no such acceptance in writing by the fourth partner being forthcoming, the so-called instrument of partnership remains an incomplete instrument.

8. In my opinion, therefore, the answer to the question is in the negative.

JUDGMENT.

RANKIN, C. J.:—In this case, it appears that three persons together with a fourth—the mother of one of them—were carrying on a business in co-partnership as dealers in piece-goods and commission agents under the name and style of Ramlal Murlidhar. By a memorandum of agreement dated the 30th day of April 1928 and made between the three persons to whom I have referred and between them only, it was nevertheless recited that the parties to the agreement together with one Musst. Rajo, the mother of Ramlal, were carrying on business in co-partnership as I have stated. The instrument then went on to express an agreement that the partnership business should continue and that the profits of the business should belong to the partners in certain shares—the lady Musstt. Rajo being declared to have one equal twentieth part or share therein. By another clause, it was provided that, if there was any loss, the loss was to be paid and borne by the partners rateably and in proportion to their respective shares in the profits of the business. The instrument was executed by the three partners mentioned above and not by the fourth—Musstt. Rajo. Thereupon it was tendered to the Income-tax Officer as an instrument such as is contemplated by Sec. 2 (14) of the Act and, although all the parties to the instrument had executed it, the Income-tax authorities refused to accept it for reasons which are given by the Commissioner of Income-tax as follows:—"A partnership, to be valid, does not require its terms to be embodied in an instrument. Moreover, a defective instrument may be supplemented by other evidence, such as conduct of the partners, to establish and define those terms. But the Indian Income-tax Act and the Rules framed thereunder make provision for the registration of those firms only that are constituted under instruments of partnership and of no other firms. It is implied, in my opinion, that a complete instrument only was intended to be valid for registration, that is to say, an instrument which does not require supplementation by other evidence but contains in itself the complete agreement constituting the partnership and by itself solely operates to create the

partnership. I do not mean to say that an instrument of partnership must consist of one document only. But an instrument must consist of a document or documents, and no such acceptance in writing by the fourth partner being forthcoming, the so-called instrument of partnership remains an incomplete instrument."

In my opinion, it is not correct to hold, on the instrument before us, that for the reasons given it is to be rejected under Sec. 2 (14). No doubt, whether we look to the Act or to the Rules made thereunder, there must be a firm constituted under the instrument; but when we come to ask ourselves what is sufficient to satisfy the requirement of the firm being constituted under the instrument, I am not prepared to say with the Commissioner that it is implied that a complete instrument only is intended to be valid for registration, that is to say, an instrument which does not require supplementation by other evidence but contains in itself the complete agreement constituting the partnership and by itself solely operates to create the partnership. It appears to me to be not impossible that a firm should be constituted under an agreement, although the agreement has not been executed by all the partners. No doubt it would be very reasonable to have this requirement and I need express no opinion as to whether it is open under the rule-making power given by the Act that such requirement should be insisted upon. I am unable to say that either the Act or the Rules go so far as the Commissioner of Income-tax has in this case considered. I say nothing by way of objection to the proposition that the Income-tax Officer may have the right to satisfy himself that the transaction evidenced by the instrument is the real thing. But, in my opinion, if the Commissioner of Income-tax comes to the conclusion that before her death Musstt. Rajo had assented to this instrument and that when it was put forward for registration it was put forward by her along with the other partners to be registered, it is such a document as may be admitted to registration under the Indian Income-tax Act.

We have been referred to a decision of the Court of the Judicial Commissioner of Sind, *Bulchand Keshavdas* v. *The Commissioner of Income-tax*.[1] Mr. Roy has adopted the observations of the Additional Judicial Commissioner Mr. Rup Chand in that case as part of his argument. It appears to me that the reasoning of the learned Additional Judicial Commissioner supports the view which I have expressed.

The assessees should have their costs of this Reference.

GHOSE, J.:—I agree.

BUCKLAND, J.:—I agree.

(1) A. I. R. (1930) Sind. 301.

(413) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Justice Sir C. C. Ghose, Kt., and Mr. Justice Buckland.

(10th December, 1930.)

Multanchand Johurmul *Assessee.*

v.

The Commissioner of Income-tax, Bengal .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 4 (2) and 66 (2) and (3)—Business in British India and outside—Remittances to and fro—Excess remittances into British India—Assessability as remittances of profits—Creditor of British Indian business paid by foreign business—Assessability as remittances—Reference to Court—New matter, introduction of.

Where there were remittances between the assessee's firm in Calcutta and the branch firms in the State of Cooch Behar, the excess remittances to the Calcutta firm that is, the excess of credit over debit, can be held on purely general grounds, in the absence of production of foreign branch accounts, to be remittances of foreign profits.

Sums of money owed by the Calcutta firm to a creditor residing in Cooch Bihar which were paid by the Cooch Bihar firm there cannot be treated as received in Calcutta constructively within the meaning of Sec. 4 (2) of the Income-tax Act.

At the hearing of a reference under Sec. 66 (2) of the Act the assessee is not entitled under Sec. 66 (3) to introduce matters not referred on which a statement of the case would be necessary.

Case [Civil Reference No. 10 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The question of law, hereinafter stated, which is being referred for the decision of the Hon'ble High Court under sub-section 2 of section 66 of the Indian Income-tax Act (XI of 1922), arises out of the assessment for the year of assessment 1929-30 of Multanchand Johurmull, hereinafter referred to as "the assessees".

2. The facts are as follows:—

The assessees are a Hindu undivided family carrying on in Calcutta business of various sorts, including a commission agency in jute and spices. Their books contained an account in the name of Multanmal Joharmal in which were entered the following transactions with Jamaldi, a place in Cooch Behar, outside British India:—

Remittance from Jamaldi.

Rs. 43,849-10-3 including interest of Rs. 5,830-6-0.

Dr. Rs. 21,375- 7-0.

There was another account in the same name containing entries of transactions with a second place in Cooch Behar called Mecktiganj. This account contained the following entries:—

Remittance from Mecktiganj.

Rs. 97,978-5-0 including interest of Rs. 3,674-3-3.

Remittance from Calcutta.

Rs. 63,793-6-0.

3. The assessees informed the Income-tax Officer that both the above accounts were accounts of a Zemindary owned by the family in Cooch Behar, Jamaldi and Mecktiganj being collection centres of Zamindary income. They were required by the Income-tax Officer to produce the accounts kept in those places but pleaded that the accounts of the last two or three years were under detention with the Civil Courts in Cooch Behar. In corroboration of the plea a summons to a witness from those courts was tendered in evidence. The Income-tax Officer asked them to produce the accounts of *any* year whatever, but they failed to comply. He therefore held that the accounts in question were accounts of transactions with branches and that the excess of remittances to Calcutta over remittances from Calcutta in either case was profit brought into British India, and assessable under sub-section 2 of section 4 of the Act. The contention that the receipts were Zamindary collections was not persisted with, but it was pointed out that, in the total sum of remittances from Jamaldi to Calcutta, was included a sum of Rs. 8,669-4-3, which sum had not actually been remitted to Calcutta but was a book credit covering payment by the Jamaldi concern to one Joychandlal Kothari, a Cooch Behar bepari, on behalf of the Calcutta office, while the remittances from Mecktiganj to Calcutta covered a similar payment to the same person of Rs. 28,483-0-6. The credits in question were set off by corresponding debits in the account of the bepari in question. They urged that the profits computed by the Income-tax Officer as having been brought into British India should be reduced by these two sums. The Income-tax Officer disallowed this contention also, holding that the amounts covered by the two payments in question were "constructively" received in British India. He made assessment accordingly after deducting from the respective totals of remittances into British India the sums included therein as interest, which sums he had already disallowed as business expenses in dealing with the interest account, and they were therefore not liable to assessment.

4. The assessees appealed to the Assistant Commissioner. The learned pleader who made appearance on their behalf informed the Assistant Commissioner that, on account of his inability to prove that the business at Mecktiganj and Jamaldi had actually made no profit, he would not contest that excess of remittances to Calcutta by those businesses over remittances from Calcutta was profit brought into British India and he confined his objection to the inclusion in the total of profit brought into British India of the sums paid in Cooch Behar to the said Joychandlal Kothari. The Assistant Commissioner disallowed the objection and confirmed the assessment.

5. Thereupon the assessees made a combined application under sections 33 and 66 (2). It was set down as follows in the written application:— "there is a slight inaccuracy in the recording of your petitioners' conten-

tions and arguments in the order of the learned Assistant Commissioner. Your petitioners did not waive or abandon their objection to the principle of regarding all excess credits as profits, although your petitioners instructed their pleader not to press the point if their contention as to transfer entries arising out of Joychandlal Kothari's account should be accepted. It was at most a conditional waiver and not an absolute waiver".

6. I have refused to interfere under section 33.

7. The following questions of law have been framed by the assessees for reference to the Hon'ble High Court:—

(*a*) Whether the finding that the excess of credits over debits between two firms one in British India and the other outsider represents profits is sound in law. Is there any legal presumption in favour of such finding.

(*b*) Whether the finding that the Cooch Behar firms were branches of Calcutta was based upon evidence or mere assumption without evidence. Whether and how far would the preliminary finding that the Cooch Behar firms were branches affect the concluding finding or inference that excess of credits over debits would represent profits.

(*c*) Whether the doctrine of constructive receipts of income from outside British India has been rightly deduced and applied with relation to the two sums of Rs. 8,669-0-0 and Rs. 28,483-0-3 originally standing to the credit of Joychandlal Kothari and subsequently transferred to Jamaldi and Mecktiganj accounts. Has the doctrine of constructive receipt any place for determining the liability of an assessee for any income accruing outside British India and received in British India.

8. Question (*a*) is referred. In my opinion the answer to the question is that in view of the inability of the assessees to produce evidence, the method of computing the profits of the Cooch Behar concerns adopted by the Income-tax Officer was a reasonable method and in point of fact was the only possible method which was open to him.

9. Question (*b*) contains two questions in one. The first of these, *viz.*, whether the Cooch Behar concerns were branches of the Calcutta firm, is a question of fact. That the answer is in the affirmative is obvious. The contention of the assessees is seen from the written application under sections 33 and 66 (2), where it is set down as follows, "these firms were independent units and not dependent upon the Calcutta firm as branches either in the matter of finance or control." The contention is irrelevant and is proved by the entries in the Calcutta books to be untenable. Independent concerns would not make remittances to and from one another after such fashion. I therefore do not refer the first part of Question (*b*). The second part of Question (*b*) does not therefore arise and is also omitted from the reference. The intention of the second part is also obscure.

10. Question (*c*) is referred. By the entries of the sums in question in the Calcutta accounts, debts of the Calcutta concern incurred in British India and entered in the accounts in British India were liquidated. In my opinion, therefore, the answer to the question is that the sums in question were profits received in British India within the meaning of sub-section 2 of section 4 of the Act.

Bimalacharan Deb and *H. Bhattacharya*, for the Assessees.

N. N. Sircar (Advocate General) and *Radabinode Pal*, for the Crown.

JUDGMENT.

RANKIN, C. J.:—In this case the Commissioner of Income-tax has referred to this Court two questions. It appears that the assessees are a Hindu undivided family, that they have a certain business in Calcutta and that they also have certain businesses at places called Mecktiganj and Jamaldi which are situated out of British India in the State of Cooch Behar. It also appears that in assessing the assessees to income-tax, the Income-tax authorities have found that the Cooch Behar businesses made remittances to Calcutta which exceeded the remittances which the Calcutta business made to them. In the books, the matter was treated as though the remittances to Calcutta were carrying interest and, as the persons who paid and the persons who received this interest are the same, namely the assessees—the undivided Hindu family—a question has arisen as to whether this book entry of interest has any consequence as a matter of inference of fact or otherwise. The first thing that happened was that these remittances from Cooch Behar were enquired into by the Income-tax Officer who was of opinion that, having regard to the transactions between the different branches, so to call them, the remittances to Calcutta were remittances of profits made in Cooch Behar. It appears that, for the reasons given by the assessees, no accounts whatsoever of the Cooch Behar business were produced before the Income-tax Officer and the first question which is referred to us is in the following terms: "Whether the finding that the excess of credits over debits between two firms—one in British India and the other outside—represents profits is sound in law? Is there any legal presumption in favour of such finding?"

Now, this question ought not perhaps to have been referred at all in the terms in which it is stated. But the Income-tax Officer has found that the moneys to the extent of the excess over the moneys sent from Calcutta to Cooch Behar were moneys received in British India. He has not purported to treat the whole of them as received in British India but only the excess as received in British India. He found proceeding partly upon admissions that the Cooch Behar concerns were branch businesses and this question is not referred to us. The assessees failed to produce any accounts of these businesses whatever. Thereupon he has held on purely general grounds that the moneys which this business in Cooch Behar did remit represent profits which originally arose in Cooch Behar. As regards that, it seems to me that it was open to him so to find and in my judgment, there is nothing unsound in law in the view which he has taken. That being so, it seems to me that the first part of question (*a*) must be answered against the assessees. The second part of it does not appear to me to arise.

The next question which is referred to us arises in this way. It seems that one Joychand Lal Kothari resides in Cooch Behar. It also seems that he sent jute for sale to the Calcutta business of the assessees, that they sold it and that a certain amount was due to him by the Calcutta business. Instead of sending money from Calcutta to Joychandlal Kothari the assessees got their Cooch Behar branch or branches to pay to Joychandlal Kothari in Cooch Behar the debt which was really due from the Calcutta business and the Commissioner of Income-tax has held on that footing that these amounts paid in Cooch Behar by the Cooch Behar branches were received in British India constructively. In my judgment, that is not so.

We have been referred to certain cases on the subject particularly to the case of *Gresham Life Assurance Company* v. *Bishop*[1] and also to the case of the *Scottish Mortgage Company of New Mexico* v. *McKelvi*[2] decided by the Court of Exchequer in Scotland. There is also another case, the case of *Forbes* v. *Scottish Widow's Fund and Life Assurance Society*.[3] But in my judgment, these cases do not form a foundation for holding that, in the present case, these sums of money which were paid to Joychandlal Kothari were received in Calcutta and the Advocate General did not in the end persist in so contending.

It has been represented to us by the learned Advocate General that, although question (*c*) was raised as a question of law by the assessees and has been referred by the Commissioner, it is not clear that the question is of any importance. However that may be it will be for the Income-tax authorities to decide, when they re-assess the assessees upon the footing that the sums which were paid to Joychandlal Kothari were not sums received or deemed to have been received in British India within the meaning of section 4 of the statute.

There will be no order for costs on either side.

The reference made by the Commissioner was made on the 26th of July last. He was asked to refer three questions but he referred two and refused to refer one. Thereupon, after this Reference had been in the paper for hearing, a petition is presented to the Court under sub-section (3) of section 66 asking for a Rule upon the Income-tax authorities to show cause why they should not state a case upon the question which the Commissioner refused to refer. I would only say that this practice will be of no avail to any assessee. We are sitting here to hear and decide the Reference which the Income-tax Commissioner has made and any device to introduce matters which have not been referred will be firmly discouraged. It is quite obvious that, if this new question was to be referred at all, it would be necessary to have before us a statement of the case upon it at the time when we were dealing with the other questions that have been referred. Such an application could only be made by coming and asking on good grounds for an adjournment of the hearing of the Reference which the Income-tax Commissioner has made and the idea that the Reference made by the Income-tax Commissioner can be extended by now presenting to the Court an application under clause (3) of section 66 is quite unreasonable. As the matter, however, has been mentioned and the application moved by Mr. Deb on behalf of the assessees, it remains only to dismiss the application. It appears abundantly clear that the reason why this question was not referred by the Commissioner is that it was a question of fact and that he had evidence upon the books of the assessees to enable him to deal with the question.

GHOSE J.:—I agree.

BUCKLAND J.:—I agree.

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(1) 4 Tax Cas. 464; (1902) A. C. 287.
(2) 2 Tax Cas. 165.
(3) 3 Tax Cas. 443.

(414) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Sir Shadi Lal, Kt., Chief Justice,
Mr. Justice Harrison, Mr. Justice Tek Chand,
Mr. Justice Dalip Singh and *Mr. Justice Johnstone.*
(12th December, 1930.)

Muhammad Hayat Haji Muhammad Sardar .. *Assessee.**

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 22 (4), 23 (3), and (4)—Inquiry under Sec. 23 (3)—Issue of notice for production of accounts under Sec. 22 (4)—Assessment under Sec. 23 (4) for default, Legality of—Best judgment assessment, Rules governing—Limits of Income-tax Officer's powers.

After the commencement of an enquiry under Sec. 23 (3) of the Income-tax Act the Income-tax Officer can issue a notice under Sec. 22 (4) calling upon the assessee to produce the accounts of the 'previous year' and three years prior thereto and on failure to comply with it, make an assessment under Sec. 23 (4).

In making an assessment to the best of his judgment under Sec. 23 (4) the Income-tax Officer does not possess absolutely arbitrary authority to assess at any figure he likes and though not bound by strict judicial principles he should be guided by rules of justice, equity and good conscience.

Case [Civil Reference No. 13 of 1929] stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces in compliance with an order of the High Court, dated 5th December, 1928.

CASE.

By an order of the High Court dated the 5th December 1928, I have been required to state a case and to refer to the Hon'ble Court with my opinion two questions of law arising out of the assessment to income-tax of Messrs. Muhammad Hayat Haji Muhammad Sardar of Patti, district Lahore, for the year 1926-27.

2. *FACTS OF THE CASE*:—Messrs. Muhammad Hayat Muhammad Sardar (hereinafter referred to as the assessee) are an 'unregistered firm' carrying on the business of cotton ginning at their factory at Patti, in the Kasur tahsil. For the assessment of 1926-27 the assessee filed on the 23rd September 1926 a return showing a loss of Rs. 8,689 in the previous year, 1st April 1925 to 31st March 1926. Thereupon the Income-tax Officer served on him a notice under Sec. 23 (2) of the Income-tax Act calling on him to produce evidence in support of his return. In response to this notice account books were produced for the period 1-8-25 to 23-3-26, or less than eight months of the total accounting period. On being questioned regarding the first four months of the 'previous year', the assessee stated that he did not do any business during that period and so no accounts were maintained. The Income-tax Officer then served on him a notice under Sec 22 (4) of the Act calling on him to produce the complete accounts for the year 1925-26 and the three years prior to that. On 30th October 1926, the date

* (1931) 12 Lah. 129; A. I. R. (1931) Lah. 87.

fixed in this notice, the assessee appeared and stated that the books for the three years 1922-23, 1923-24 and 1924-25 had been misplaced, but he would look for them. He was given an adjournment till the 15th November 1926, on which date he appeared and stated that the books were not traceable and could not be produced. The Income-tax Officer thereupon remarked that this was "a lame excuse. The firm has the accounts and does not produce them". He accordingly held that the assessee had failed to comply with the terms of a notice issued under Sec. 22 (4) of the Act, and proceeded to make an assessment under Sec. 23 (4) 'to the best of his judgment'. He estimated the income of the firm for the previous year at Rs. 70,000 and imposed the tax accordingly.

3. The assessee then filed an application under Sec. 27 before the Income-tax Officer stating that he was prevented from complying with the notice under Sec. 22 (4) by the fact that the account books for the three years prior to 1925-26 did not exist, and praying that the assessment under Sec. 23 (4) be cancelled and a fresh assessment made. The Income-tax Officer considered this application and recorded an order in which he detailed all the reasons which led him to the conclusion that the books must have been in existence when the notice was served, and in consequence of which he refused to reopen the assessment. Against this refusal the assessee appealed to the Assistant Commissioner, who, in an order under Sec. 31 upheld the finding of the Income-tax Officer that the books were in existence at the time of the serving of the notice, and rejected the appeal.

4. Finally, the assessee applied to the Commissioner to cancel or modify the assessment under Sec. 33, or if he were not disposed to do this, to refer certain questions to the High Court under Sec. 66 (2). My predecessor, in the exercise of his powers under Sec. 33 of the Act, called for the record, and after reviewing the evidence was satisfied that "the assessing authorities had good reason for their finding that the books were wilfully withheld", and refused to interfere on this point. He however took up the question whether the Income-tax Officer was justified in estimating the assessable income at Rs. 70,000, and remanded the case to the Income-tax Officer for a further report. The Income-tax Officer, in his report dated the 3rd August 1927, gave his reasons in detail for the estimate. My predecessor, in his order under Sec. 33 thereupon wrote: "In the absence of full accounts, it is obviously impossible to say even approximately what the petitioners earned in 1925-26. But one point is clear, namely, that the petitioners would not have withheld their accounts had they not considered it probable that they would benefit by doing so. In other words, they must have earned a substantial profit, but whether by their factory, or by *satta* transactions, or by a combination of both, it is impossible to say. In 1925-26 the petitioners had also to be assessed on an estimate which amounted to Rs. 50,000. As in spite of this they failed to comply with their statutory obligations in 1926-27, it must be presumed, in the absence of evidence to the contrary, that their income in 1925-26 exceeded the income in 1924-25. In the circumstances I am not prepared to modify the Income-tax Officer's estimate of Rs. 70,000".

My predecessor also refused to make a reference to the High Court as he held that no question of law arose in the case.

5. *QUESTION TO BE REFERRED*:—I have now been ordered by the Hon'ble Judges to refer to the Court the following questions:—

(1) "In a case in which an assessee has duly filed a return of his income for the previous year, and has also, on receipt of a notice issued under

Sec. 23 (2), produced evidence in support of the return including such account books as he possesses, but the Income-tax Officer is not satisfied with such evidence, should he proceed to make the assessment under Sec. 23 (3), or can he at this stage issue a notice under Sec. 22 (4) calling upon the assessee to produce his complete accounts for the 'previous year' and for three years prior thereto, and on the assessee's failure to do so, assess him under Sec. 23 (4)?

(2) In making an "assessment to the best of his judgment" under Sec. 23 (4), does the Income-tax Officer possess absolutely arbitrary authority to assess at any figure he likes, or is he to be guided by any judicial principles or rules of equity, justice and good conscience?"

6. *OPINION OF THE COMMISSIONER:*—Since the Hon'ble Judges have asked me to state my opinion on these questions, and since I am also required by the Act to do so, I will first deal with question No. 1. But I find considerable difficulty in answering the question as formulated, and I would with the utmost respect beg permission to draw attention to the words "including such account books as he possesses". These words would appear to imply that the assessee in this case had produced all the account books in his possession. It has however been found as a fact both by the Income-tax Officer and the Assistant Commissioner, as well as by the Commissioner, that certain account books in the assessee's possession were deliberately withheld. I would, with all due deference to the authority of this Hon'ble Court, point out that this finding of fact must be accepted as the basis of the case, and only questions of law arising from the facts as found by the Assistant Commissioner are to be considered under Sec. 66 of the Act. I would therefore respectfully submit that these words be omitted: they are not essential to the formulation of the question which, if I understand them aright, the Hon'ble Judges desired to be referred to them.

7. If this modification be accepted, the answer to the first question is in my opinion in the affirmative. This question has now been before five of the Indian High Courts. It has been answered against the assessee by a unanimous Full Bench of three Judges of the Calcutta High Court in *Harmukari Dulichand* v. *Commissioner of Income-tax, Bengal,*(1) by a unanimous Full Bench of five Judges of the Patna High Court in *Ram Khelwan Ugamlal* v. *Commissioner of Income-tax, Bihar and Orissa*(2) overruling *Brij Raj Rang Lal* v. *Commissioner of Income-tax, Bihar* and *Orissa*(3) (a decision of two Judges), by a Division Bench of the Allahabad High Court in *Chandra Sen Jaini* v. *Commissioner of Income-tax, United Provinces*(4) and again recently by a unanimous Full Bench of three Judges of the and again recently by a unanimous Full Bench of three Judges of the Madras High Court in *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras.*(5) Now that the earlier decision of the Division Bench of the Patna High Court has been overruled, there remains in the assessee's favour the decision of a Division Bench of this Hon'ble High Court in *Khushiram Karamchand* v. *Commissioner of Income-tax, Punjab*(6) which was decided when the earlier *dictum* of a Divisional Bench of the Patna High Court had not yet been overruled. I would with all due deference draw attention to the weight of authority which now exists in favour of the Crown on this question, and in view of this most respectfully request that the previous decision of this Hon'ble Court be reconsidered.

(1) 3 I. T. C. 198.
(2) 3 I. T. C. 225.
(3) 2 I. T. C. 458.
(4) 3 I. T. C. 17.
(5) 3 I. T. C. 290.
(6) 2 I. T. C. 517.

8. The arguments in favour of the view which I have put forward have been repeatedly expounded by the learned Judges in the cases quoted above, and it is perhaps in the circumstances hardly necessary for me to recapitulate them. The Hon'ble Judges of this Court in the case of *Khushiram Karamchand* v. *Commissioner of Income-tax, Punjab*[1] were, I sumbit with all respect, unduly impressed by the short titles of sections 22 and 23 of the Act, by the position occupied by sub-clause (4) of Sec. 22, and by the order of the defaults enumerated in sub-clause (4) of Sec. 23. I submit that the wording of sub-clause (4) of Sec. 22 is absolutely explicit, and gives no hint whatever of any restriction of the nature which has been inferentially imported from other sources. That sub-section, with its proviso, imposes two restrictions only on the power of the Income-tax Officer to serve a notice calling for accounts. These restrictions are (1) that such a notice may only be served on the principal officer of a company or on any person upon whom a notice calling for a return of income has already been served, and (2) that the accounts demanded shall not relate to a period more than three years prior to the previous year. I submit that if the Legislature had intended to impose any further restrictions in regard to the use of this sub-section, it would have done so in clear and unambiguous language, and would not have left them to be inferred from the mere order of the sections. The restriction suggested, namely that the power cannot be exercised after a notice under Sec. 23 (2) has been served is an exceedingly important one, and should not be assumed to have been intended unless such an intention has been most explicitly expressed in the statute.

9. I would further submit that unless it be contended that a notice under Sec. 22 (4) can only be issued before a return of income has been received—a view for which there is now no authority whatever and which was not endorsed by this Hon'ble Court in its previous ruling—there is no practical reason why a notice under Sec. 22 (4) should precede the notice under Sec. 23 (2). Once the assessee has filed his return, it is obligatory on the Income-tax Officer if he is not satisfied with the return to serve him with a notice under Sec. 23 (2) and thus give him an opportunity to appear and produce the evidence on which he relies. It is, on the other hand, by the wording of the statute, left to the discretion of the Income-tax Officer to serve or not to serve on the assessee a notice under Sec. 22 (4). If the assessee appears in response to a notice under Sec. 23 (2) and himself produces all the relevant accounts which prove what his income was, the Income-tax Officer may well be satisfied and may not find it necessary at all to issue a notice under section 22 (4). If on the other hand the assessee does not produce his accounts and attempts to fib the Income-tax Officer off with other unsatisfactory evidence, I respectfully submit that there is no reason whatever why the Income-tax Officer should not be in a position at this stage to say "Either you will produce the necessary accounts which I require or I shall assess you by estimate".

10. In this connection I respectfully beg leave to quote the exact words used by Rankin C. J. in the Calcutta ıse cited above. "The next question is whether it can be contended that because in fact a notice under clause (2) of Sec. 23 was served upon this firm the power provided by clause (4) of that section to meet a case of withholding of accounts can no longer be exercised. In my judgment there is no ground for that contention. . . . . If the assessees are not in default, if they produce their books and attend then whether they produce other evidence or not it will no doubt be for the Income-tax Officer to proceed under sub-section (3) of that

(1) 2 I. T. C. 517.

section. (i. e., section 23). But if when the date comes it turns out that the assessees are withholding their books of accounts, but want to produce some other evidence, it seems to me reasonably plain that the Income-tax Officer may well say "You are in default for withholding your accounts. You will be dealt with on that basis. In the absence of available accounts neither argument nor other evidence is anything but a waste of time. It is *mera palpatio*. You will be treated as defaulters and in no other way? In my judgment that is what the statute intends. The statute intends that persons who deliberately make default in producing their accounts when asked to do so under clause (4) of section 22 shall be treated as defaulters and that the Income-tax Officer shall make the assessment to the best of his judgment."

11. Again in *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*[1] the learned Judge remarked. "If the Act provided explicitly for calling for accounts during the inquiry under section 23 (3), there might be some reason for supposing that the provision for calling for accounts under section 22 (4) applied only to an earlier stage. But the power given to an Income-tax Officer by section 23 (3) is to require the production of evidence 'on specified points'. If it were intended by those words to give power to call for accounts for several years, the language would in my opinion be ill chosen and misleading. If it were intended to give power to call for accounts, what object could there be in failing to say so explicitly, what object could there be in using language in such contrast with the language of section 22 (4)? The accounts of a series of years may provide evidence on a specified point; but to describe them as "evidence on a specified point" is obviously inappropriate. To my mind the language of section 23 (3) adds force to the Commissioner's contention. If accounts can be called for at any stage, before or after the return is submitted, then in the inquiry under section 23 (3) power to call for further evidence on specified points is enough and the language of that sub-section need not be strained in any way." And again later he says, "the man who refuses to produce his accounts when the Income-tax Officer has expressed under Sec. 23 (2) dissatisfaction with his return is clearly more blameworthy and obstructive than the man who fails to produce them before he has made his return, when no one has yet expressed an opinion whether his return will be an honest one or not. When once it is admitted that the Income-tax Officer must have power to call for accounts in the inquiry under Sec. 23 (3) and without it the inquiry might easily be reduced by the assessee to a farce—the omission to penalise failure to comply with the officer's requisition under that sub-section by arbitrary assessment is strong evidence that the right to call for accounts even at that stage must be found elsewhere, that is, in section 22 (4)."

12. I turn now to the second question which I have been asked to refer, namely, whether in making an "assessment to the best of his judgment" under section 23 (4), the Income-tax Officer possesses absolutely arbitrary authority to assess at any figure he likes, or is he to be guided by any judicial principles or rules of equity, justice and good conscience.

In my opinion the Income-tax Officer, when making an assessment under Sec. 23 (4), has no alternative but to make an arbitrary assessment, and therefore must certainly be considered to have power to do so. The liability to assessment under Sec. 23 (4) can only arise when an assessee has withheld some or all of the material necessary for an accurate assessment. In the absence of a return or accounts or other essential evidence

(1) 3 I. T. C. 290.

which he is empowered to require and which is necessary for a precise determination of the assessee's income, the Income-tax Officer has no option but to take a leap in the dark, and to assess as best he can. The position in this respect is exactly the same as in England, and I would invite the Court's attention to the remarks of the Lord President of the Court of Session in the case of *Macpherson and Co.*, v. *Moore*:(1) "Messrs. Macpherson and Co., if they do not choose, as they have not chosen, to state an account so that the amount of the profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown." The phrase "random assessment" is noteworthy. Lord Mackenzie said in the same case, "with regard to the Solicitor-General's observations upon the practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Courts are concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether that can be done in a satisfactory manner or not".

In the Calcutta case which I have already cited above, the learned Chief Justice also dealt with this very point and observed "It has been said that the Income-tax Officer must proceed in a judicial manner and Sec. 37 has been mentioned in this connection. Fundamentally no doubt the Income-tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts, though I would point out that the Income-tax Officer is not a court, he has not the procedure of a Court and he is to some extent a party or judge in his own case. However true it be and for whatever purpose it be true that the assessment to income-tax is to be done in a judicial manner, the first thing which must be laid down as a condition before a person can complain of any departure from this principle is this that he too must produce the evidence which the law requires him to produce. It is idle and absurd for a person who has books of account and deliberately withholds them to complain of not being treated in a judicial manner. The judicial manner is a manner which proceeds upon evidence, and the basis of the statute is to see that available evidence is produced. It is then and only then that the assessment is to be made upon a judicial consideration of the evidence. Otherwise it is to be made 'to the best of his judgment' and *brevi manu*."

13. In this connection it is also significant that whilst an ordinary assessment under Sec. 23 (3) must be recorded in a written order, there is no similar provision in Sec. 23 (4). In practice in such cases Income-tax Officers do record notes, which are not the same as assessment orders and which are of importance only in so far as they show why Sec. 23 (4) was applied, so that if the validity of these grounds is impugned in an appeal it will be possible for the Assistant Commissioner to deal with the appeal. The grounds on which an Income-tax Officer based his estimate, if there be any such, need not be given at all and cannot be appealed against. In practice the basis of the estimate is often also mentioned. That was not done in the present case, but was communicated to the Commissioner in a separate report (Exhibit C*) when he called for it. I submit that, considering the fact that the assessment had to be made by estimate, the grounds for that estimate were as substantial as could possibly be expected in the circumstances. In particular I would draw attention to the fact that in the previous year also the assessee had by his default incurred the liability of an arbitrary assessment, and that his income had been estimated at

(1) 6 Tax Cas. 107 at page 113.

* Not printed.

Rs. 50,000. If in the following year he was prepared again to incur that liability rather than produce his books, it is to my mind a most natural presumption that he anticipated with equanimity a repetition of last year's guess and stood to lose nothing by it; in other words his real income was more than Rs. 50,000. In these circumstances a guess of Rs. 70,000 could in no sense be regarded as preposterous or far-fetched. It is within my experience that estimates of this kind have been trebled, quadrupled and quintupled before the assessee's true income has been reached and he has thus been induced to lay all his cards on the table.

14. It is, however, I respectfully submit, not for this Hon'ble Court to embark on an examination of the merits of the estimate, which the law imposes on the Income-tax Officer the duty of making. Such an examination would amount to nothing less than a revision of the assessment, which I submit is the function of the Assistant Commissioner and the Commissioner of Income-tax. There are in the provinces within the jurisdiction of this Court some 40,000 assessees, of whom I regret to say from ten to twenty per cent have to be assessed by estimate. If the High Court were disposed to give any ground for the idea that defaulters who have incurred this liability could, by protesting that the estimates were unjustified and extravagant, have the merits of their assessments reviewed in this Court, the effect would be as voluminous as it would be unwelcome. I would also respectfully submit that if it be considered a dangerous admission that the Income-tax Officer in any class of cases possesses absolutely arbitary authority, it is to be remembered that even an Income-tax Officer, even when dealing with a defaulter, possesses a conscience: and that behind him there are the consciences of the Assistant Commissioner and the Commissioner. Whether in any particular assessment the Income-tax Officer in the exercise of the full discretion which the law allows him had in fact discarded all considerations of equity and good conscience would, I submit, amount to a question of fact for the Commissioner to decide, since it would involve a re-estimate, on the materials available, of the probable income of the assessee. I would therefore suggest that the answer to the second question is that the Income-tax Officer, whilst he should act in this as in all other matters in good faith and in good conscience, must of necessity in dealing with cases under Sec. 23 (4) make an arbitrary assessment.

O' Connor, for the Assessees.

Aggarwal and *Amar Nath Chona*, for the Crown.

JUDGMENT.

SHADI LAL, C. J.:—The questions of law, which have been referred to us for decision, are stated in the following terms:—

(1) 'In a case in which an assessee has duly filed a return of the income of the "previous year", and has also, on receipt of a notice under section 23 (2) produced evidence in support of the return including some, but not all of his account books, and the Income-tax Officer is not satisfied with such evidence, should he proceed to make the assessment under section 23 (3), or can he, at that stage issue a notice under section 22 (4) calling upon the assessee to produce his complete account books for the "previous year" and for three years prior thereto, and on the assessee's failure to do so, assess him under section 23 (4)?

(2) "In making an "assessment to the best of his judgment" under section 23 (4), does the Income-tax Officer possess absolutely arbitrary authority to assess at any figure he likes, or is he to be guided by any judicial principles, or rules of equity, justice and good conscience?"

The answer to the first question depends upon the construction to be placed upon sub-section (4) of section 22 of the Income-tax Act (XI of 1922). Before examining the language of that sub-section, a brief reference may be made to the procedure followed by an Income-tax Officer in obtaining a return of the income chargeable to income-tax. It is provided that, in the case of a company, the principal officer thereof shall furnish, on or before the 15th day of June in each year, a return of the total income of the company during the previous year, and that, in the case of any person other than a company, the Income-tax Officer shall serve upon him a notice requiring him to furnish a return of his total income. The provisions of the law relating to the furnishing of a return or a revised return of the income, which are embodied in sub-sections (1) to (3) of section 22, do not present any difficulty. We now come to sub-section (4) of that section, which runs as follows:—"The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require." This sub-section empowers the Income-tax Officer to get the accounts and documents which may help him in making an assessment of the income. The question, which has been debated before us, is whether the power to serve a notice contemplated by the sub-section can be exercised only before the Income-tax Officer embarks upon an enquiry under section 23, sub-section (3) into the correctness or otherwise of the return submitted to him, or whether he can serve the notice even after the commencement of that enquiry. *Ex concesso* the language of the Statute does not impose any restriction as to the time when the notice is to be served. It may be served at any stage of the proceedings taken by the Income-tax Officer, that is to say, before the submission of a return, or after the submission of a return but before the commencement of an enquiry into its correctness, or even during the course of the enquiry. There can be no doubt that, if we confine our attention to the language of the sub-section, our answer to the question must be in favour of the Commissioner of Income-tax.

The learned counsel for the assessee (the expression "assessee" in this judgment is not used in the strict sense of the term as defined in section 2, sub-section (2) but includes a person whose total income is, in the opinion of the Income-tax Officer, of such an amount as to render him *prima facie* liable to income tax, but whose liability to pay the tax is yet to be determined) urges that it was not contemplated by the Legislature that the sub-section (4) of section 22 should be used after the return has been made; and in support of his contention, he invites our attention to section 23, sub-section (4) of the Act, which prescribes the penalty for non-compliance with, *inter alia*, a notice requiring the production of the accounts and documents. In order to appreciate his contention and the argument which he seeks to deduce from the other provisions of section 23 it is necessary to set out that section *in extenso*:—

23 (1) If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return.

(2) If the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

(4) If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and, in the case of a registered firm, may cancel its registration.

The section enumerates the various cases which may arise after the service of a notice calling for a return, and prescribes the procedure to be adopted by the Income-tax Officer in making an assessment in each case. If no return is supplied to him, he is required to make an assessment to the best of his judgment, *vide*, section 23 sub-section (4). If a return is made and he finds it to be complete and correct, he must determine the amount of the income-tax on the basis of the income mentioned in the return, *vide* section 23, sub-section (1). If he, however, considers the return to be incorrect or incomplete, he has no authority to reject it and to make the assessment to the best of his judgment as he is entitled to do when no return is made. He must give the assessee an opportunity to prove the accuracy and completeness of the return made by him, and he is, therefore, enjoined by section 23 (2) to serve on the latter a notice requiring him either to appear at the office of the Income-tax Officer, or to produce, or to cause to be produced, evidence in support of his return. If the assessee does not comply with the terms of the notice, the Income-tax Officer has no material before him except the incomplete or incorrect return; and he has, therefore, no alternative but to make an assessment to the best of his judgment, *vide* section 23 (4). When the assessee complies with the terms of the notice, the Income-tax Officer is bound to hear the evidence which the former may desire to produce in support of his return, and, if, in the course of the enquiry, the Income-tax Officer considers that additional evidence should be produced, he is authorised to complete the enquiry by taking such evidence after specifying the points requiring elucidation. After he has received the evidence produced by the assessee and also the evidence, if any, which he has himself called for on the points specified by him, he must assess the income on the material produced before him and has no right to make an assessment to the best of his judgment, *vide*, section 23 (3).

It is, however, possible that, while making an enquiry under section 23 (3) he may stand in need of the assessee's accounts for a period allowed by the law, or a document in his possession, should he proceed under section 23 (3) and section 37 (both of which provisions confer upon him the necessary power), or is he entitled to issue a notice under section 22, sub-section (4) and, in the event of non-compliance with the terms of the notice, to make a summary assessment under section 23 (4)? A perusal of the language of section 23 (4) shows that there are only three cases in which the Income-tax Officer can make an assessment to the best of his judgment. These cases are:—

(1) Where no return has been made.

(2) Where there has been a failure to comply with the terms of a notice issued under sub-section (4) of section 22 requiring an assessee to produce accounts or other documents specified therein.

(3) Where the return has been made, but the Income-tax Officer considers it to be incorrect or incomplete and serves a notice upon the assessee requiring his appearance or the production by him of evidence in support of his return, but the assessee does not comply with the terms of the notice.

The penalty incurred by an assessee in each of these cases is sufficiently drastic. The sub-section itself imposes upon him the liability to have his income assessed in a summary manner. But the matter does not end there. The summary assessment thus made carries with it the disability mentioned in the proviso to sub-section (1) of section 30, which deprives him of the right to prefer an appeal against the decision of the Income-tax Officer.

Mr. Jaggan Nath Aggarwal for the Commissioner of Income-tax seeks to bring the present case under the second category on the ground that the assessee did not comply with the notice served upon him under section 22, sub-section (4) requiring him to produce certain account books. But Mr. O'Connor for the assessee urges that the notice was served upon his client in the course of the enquiry which was being conducted by the Income-tax Officer under section 23 (3) of the Act, and that a notice under section 22 (4) could be issued only before the submission of the return by the assessee. The learned counsel places his reliance upon the phrase "having made a return" which is used in sub-section (4) of section 23 in connection with the third default, and argues that the legislature, by expressly stating that the third default can take place only after the submission of the return impliedly intended to say that the other two defaults must occur, not after the making of the return, but before that stage. There is some force in this argument which, it is to be observed, was accepted by a Division Bench of the Patna High Court in *Brij Raj Rang Lal* v. *Commissioner of Income-tax, Bihar* and *Orissa*.(1) But that judgment has been overruled by a Full Bench of that Court in *Ram Khelawan Ugam Lal* v. *Commissioner of Income-tax, United Provinces*.(2)

A careful examination of the nature of the two duties, the breach of which constitutes the first and the second defaults, does not, however,

(1) 2 I. T. C. 458. (2) 3 I. T. C. 225.

justify the assumption that those duties must necessarily be performed before the submission of a return. Indeed, one of them is merely the submission of a return; and it is obvious that, when the failure to submit a return amounts to a default, no question of the default occuring before or after the making of a return can possibly arise. It is true that the second default, which results from a failure to produce accounts or documents in compliance with notice under section 22 (4) may take place before the return is made; but in practice it is only after the submission of the return that any necessity for examining the accounts or documents is felt. The documentary evidence referred to in section 22 (4) would ordinarily be useful for checking the return, and the Income-tax Officer would require its production after he has received the return.

At any rate, one thing is absolutely clear that the notice contemplated by section 23 (2) can issue only after the return has been made; and the phrase "having made a return" merely emphasizes that fact. It is no doubt an obvious fact, and the use of the phrase in question does not add anything to what was already well known. The words "having made a return" appear to be superfluous in so far as the sub-section, as at present worded, is concerned. The explanation of this redundant phraseology may be found in the previous history of the law penalising the failure of the assessee to comply with the requisition of the Income-tax Officer. In the Indian Income-tax Act of 1918, section 18 (4) which corresponds to section 23 (4) of the present Act, was in these terms:—

> (4) "If the principal officer of any company or any other person fails to make a return under section 17 (1) or (2) as the case may be, or having made a return, fails to attend or fails to comply substantially with all the terms of a notice issued under section 18, sub-section (2) the Collector shall make the assessment to the best of his judgment."

It will be observed that the words in question, as used in that sub-section, were not open to any valid objection, though their omission even there would not have made any difference in the law. There were only two defaults dealt with in that sub-section, one was the failure to submit a return, and the other was the failure to comply, after the submission of the return, with the notice issued under sub-section (2) of section 18. But the Statute of 1922 separately mentions the default caused by the failure to produce accounts and documents in the possession of the assessee; and, as I have pointed out, this default may take place before the submission of the return as well as after it. To void misunderstanding, the draftsman of the new Act should have omitted the words "having made a return" but it appears that they were inadvertently retained. The drafting may be careless or inartistic, but it does not warrant the introduction, into the first part of sub-section (4) of section 23, of a restriction which not only does not exist there, but would not be in accord with reason and common-sense.

Be that as it may, I cannot accede to a contention which would confine the exercise of the power to call for accounts and documents to the stage prior to the submission of the return, when it can be of little or no use, and shut it out at a stage when it is most needed. It is clear that the account or other documents kept by the assessee are, in the majority of cases, the best evidence for determining his income, and it is difficult to believe that the Legislature intended to render that power practically nugatory by limiting its operation to a stage when it can hardly serve any useful purpose.

The learned counsel for the assessee also refers to the marginal notes against sections 22 and 23, and argues that the use of the phrase "return of income" as a brief description of the provision contained in section 22, when distinguished from the word "assessment" used in respect of section 23, indicates that the former section prescribing the procedure for obtaining a return from the assessee was intended to apply only to the stage prior to the commencement of the enquiry into the assessment of income to be made under the latter section. No serious argument can, however, be built upon the marginal notes which, even if they are treated as forming part of the Act, cannot control its operation.

The chronological order, in which the Statute directs the Income-tax Officer to conduct his proceedings, would lend colour to the contention that section 22 was intended to regulate his proceedings at the preliminary stage, at which he calls for the return, receives it and checks it, if necessary, by the accounts and documents kept by the assessee. After performing this function he proceeds to the next stage, namely, that of making an assessment. At that stage, it may be necessary for him to make an enquiry into the income of the assessee and to take evidence. But for that purpose he has ample power under section 23 (2) and (3) and section 37 to call for all the evidence which may be required on both sides. It may, therefore, be argued that, when the Statute has made a special provision for obtaining all the evidence required for an enquiry, it was hardly contemplated that sub-section (4) of section 22 should be requisitioned in the course of an enquiry in order to call for accounts and documents from the assessee. Indeed, it is conceded by the learned counsel for the Commissioner of Income-tax that the Income-tax Officer does not stand in need of it for making a complete enquiry, even if he is entitled to avail himself of it. It would certainly be hard upon the assessee if the Income-tax Officer, after hearing practically the whole of the evidence on both sides, decides to invoke the authority conferred upon him by that sub-section and requires the production of, say, one document, and uses the assessee's failure to produce it as an excuse for making an assessment to the best of his judgment. It cannot be seriously disputed that justice requires that, while he may make a reasonable presumption against the assessee on account of his failure to produce the required documentary evidence, he should assess the income upon the material placed before him; and that he should not resort to the drastic power of making an assessment according to his own notion of what the income might be.

But the argument *ab inconvenienti*, as well as that based upon the order in which the two sections stand, may influence the interpretation of a Statute when its language is ambiguous and capable of more than one meaning. The wording of sub-section (4) of section 22 is, however, clear and unequivocal, and does not suggest any limitation as to the time when the notice requiring the production of accounts and documents should be served. The difficulty has, to a large extent, been created by the fact that the law enacted by the sub-section which, by reason of its being an independent provision, should have been embodied in a separate section, has been made a part of a section which primarily deals with the return of income and apparently embraces the preliminary stage of the proceedings.

Coming now to the judicial decisions on the subject, I find that the weight of authority is decidedly in favour of the view that the language of the sub-section, uncontrolled as it is by any other provision in the Statute, must be given its full scope, and that the Income-tax Officer can issue the

notice contemplated by it not only before, but also after, the submission of the return, and even after the commencement of the enquiry under section 23, sub-section (3) *vide, Chandra Sen Jaini* v. *Commissioner of Income-tax, United Provinces*[1] *Harmukhrai Dulichand* v. *Commissioner of Income-tax, Bengal*[2] *Ram Khelawan Ugam Lal* v. *The Commissioner of Income-tax, Bihar and Orissa*[3] and *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras.*[4] The contention urged on behalf of the assessee was accepted by a Division Bench of this Court in *Khushi Ram Karam Chand* v. *Commissioner of Income-tax, Punjab*[5] which was followed by Mukerjee J. in an exhaustive judgment in *Lachhman Prosad Babu Ram* v. *Commissioner of Income-tax, United Provinces.*[6] There are no doubt plausible arguments in support of that contention, but after bestowing my careful consideration upon the matter I do not think that they would justify a limitation upon the scope of the sub-section when its language is wide enough to apply to all the stages of the proceedings before the Income-tax Officer.

As observed by Lord Esher in *The Queen* v. *The Judge of the City of London Court*[7] "If the words of an Act are clear, you must follow them, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity". When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words; Maxwell on Interpretation of Statutes, seventh edition, page 4.

My answer to the first question is that the Income-tax Officer can, even after the commencement of an enquiry under section 23 (3), issue a notice under section 22 (4), calling upon the assessee to produce his account books for the "previous year" and for three years prior to it, and on the assessee's failure to comply with the notice, assess his income under section 23 (4).

With respect to the second question the Statute lays down that, when the assessee has made a default mentioned in sub-section (4) of section 23, the Income-tax Officer shall make the assessment to the best of his judgment. In the majority of the cases contemplated by that sub-section there would be little or no evidence before the Income-tax Officer to guide him in determining the income; and he has, therefore, no alternative but to make an assessment upon the information received by him. The proceedings taken by him are not regulated by strict judicial principles, and he has sometimes to depend upon materials which would be wholly inadmissible in a Court of law. At the same time he cannot act in a purely arbitrary manner. Suppose a person, whose income had not in the past exceeded Rs. 5,000 in any year, makes a default as contemplated by the sub-section, the Income-tax Officer would perpetrate an injustice if he took advantage of the default and assessed the income for the accounting period at a million rupees without any justification. It cannot be seriously claimed that he has made that assessment to the best of his judgment.

On behalf of the Commissioner of Income-tax reliance has been placed upon the judgment of the Calcutta High Court in *Harmukhrai Dulichand*

(1) 3 I. T. C. 17.
(2) 3 I. T. C. 198.
(3) 3 I. T. C. 225.
(4) 3 I. T. C. 298.
(5) 2 I. T. C. 517.
(6) 4 I. T. C. 61.
(7) (1892) 1 Q. B. 273.

v. Commissioner of Income-tax, Bengal (1) but that judgment enunciates no definite rule on the subject beyond stating that a person, who has books of account and deliberately withholds them, cannot complain of not being treated in a judicial manner; and that, when available evidence has not been produced, assessment is to be made to the best of the Income-tax Officer's judgment and *brevi manu.* It has, however, been held by the Rangoon High Court in *P. K. N. P. R. Chettyar Firm* v. *Commissioner of Income-tax, Burma*(2) that, when Statute says that the Income-tax Officer "shall make the assessment to the "best of his judgment" it means that he must make it according to the rules of reason and justice, not according to private opinion, according to law and not humour", and that the assessment is to be "not arbitrary, vague and fanciful, but legal and regular". The Legislature, in allowing the Income-tax Officer to make the assessment to the best of his judgment, has no doubt conferred upon him discretion in the matter of assessing the income; and, if the assessee withholds the account-books or documents upon which a reliable estimate of income can be founded, the assessment must *ex necessitate rei* be to some extent arbitrary. But, as laid down by the Rangoon High Court in *S. P. K. A. A. M. Chettyar Firm* v.*The Commissioner of Income-tax*(3) it must nevertheless be reasonable and should not proceed purely on the Income-tax Officer's private opinion to the exclusion of all material before him. Such an assessment cannot be said to have been made to the best of his judgment. There may be cases, such as the one with which we are dealing, in which evidence has been adduced but default has been subsequently committed, and there is no reason why the Income-tax Officer should ignore such evidence and make an assessment according to his own whim and fancy.

It is true that a finding of fact recorded by him cannot be impeached even when it is not based upon any material, nor is it open to the High Court to say with respect to a particular case that the assessment has been made contrary to the rules of justice and good conscience. The High Court is, however, entitled to make a pronouncement upon the meaning of section 23 (4), and to lay down that the Income-tax Officer cannot be said to make an assessment to the best of his judgment, if he is not guided by the dictates of justice and fair play. An assessment resting upon the whim and caprice of the Income-tax Officer cannot be elevated to the dignity of an assessment made to the best of his judgment.

I accordingly answer the first part of the second question in the negative, and as to the second part I am of the opinion that the Income-tax Officer, though not bound by strict judicial principles, should be guided by the rules of justice, equity and good conscience.

HARRISON, J.:—I agree with the learned Chief Justice and wish to add nothing.

JOHNSTONE, J.:—I agree with the learned Chief Justice.

TEK CHAND, J.:—I agree with the learned Chief Justice in the answers proposed by him, though I must say that on the first question I do so not without hesitation. While I agree, that taking sub-section (4) of section 22 and sub-section (4) of section 23 as they stand, the first question must be answered in the affirmative, I venture to think with all respect, that the reasons in support of the contrary view given in the elaborate judg-

(1) 3 I. T. C. 198. (2) 4 I. T. C. 87. (3) 4 I. T. C. 182.

ments of Mukerji, J. of the Allahabad High Court in *Lachhman Prosad Babu Ram* v. *Commissioner of Income-tax, United Provinces*[1] and of Bhide, J. of our own Court in *Khushi Ram-Karam Chand* v. *Commissioner of Income-tax, Punjab*[2] cannot be lightly ignored.

Sections 22 and 23 of the Act have been the subject of much controversy in Courts and the one point which emerges clearly from these discussions is that there is room for great improvement in the language as well as the arrangement of the various sub-sections of these sections. It is, therefore, much to be hoped that the Legislature will take the earliest opportunity of reviewing the position and, if possible, of redrafting and rearranging them. This seems all the more necessary as the interpretation, which the Courts have felt bound to put on these sections, is likely to work great injustice in some cases. As has been pointed out by the learned Chief Justice, in a case in which enquiry under section 23 (2) and (3) has been started and is even practically complete it is open to the Income-tax Officer to ignore the whole of the evidence produced before him by merely issuing at that stage a notice to the proposed assessee under sub-section (4) of section 22 to produce certain documents and on his failure to do so, not only to invest himself with the power to make an arbitrary assessment but also to deprive the assessee of the right of appeal to the Assistant Commissioner and of asking the Commissioner to make a reference under section 66 to the High Court on any questions of law, which might arise for decision on the assessment.

DALIP SINGH, J.:—Considerable difficulty arises in my opinion in answering the first question referred to this Court.

As I read sections 22 and 23 of the Income-tax Act, which are the relevant sections concerned, it appears to me that the general scheme of the Act is that the Income-tax Officer is by section 22 (2) empowered to serve a notice, on a person, who, in the opinion of the Income-tax Officer, is liable to pay income-tax, requiring him to furnish a return of his income within a prescribed time. It seems to me that the Act empowers the Income-tax Officer to demand a return from a person liable to be assessed in order to enable the Income-tax Officer to assess such a person. Under section 22 (4) the Income-tax Officer is further empowered to serve a notice on such person requiring him to produce or cause to be produced such accounts or documents as the Income-tax Officer may require. It seems to me that the reason for this sub-section is that the Income-tax Officer may either suspect that a mere return by the person will not be satisfactory or, if the return has been made, may think that the return itself is not conclusive as to the income of the assessee and may, therefore, require the assessee to produce his accounts and such documents as the Income-tax Officer thinks would be relevant to ascertain whether the return made is correct or otherwise. Section 23 then proceeds to lay down that, if the Income-tax Officer is satisfied that the return made under section 22 is correct and complete, he shall assess the total income of the assessee and shall determine the assessment.

Section 23 (2) lays down that, if the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person, who made the return, a notice requiring him to attend at the Income-tax Officer's office, or to produce any evidence on which such person may rely in support of the return on specified data. It seems to me that the drafting of this section leaves much to be desired,

(1) 4 I. T. C. 61. (2) 2 I. T. C. 517.

but the scheme appears to be that this sub-section comes into play after a return has been made and the Income-tax Officer is of opinion that the return is incorrect or incomplete either by reason of the accounts and documents called for by him under section 22 (4) or on other grounds which are based on evidence in the possession of the Income-tax Officer, or on facts which may be proved by evidence later on. In other words, there is a conflict of evidence and hence need for a quasi-judicial enquiry into the matter.

Sub-section 23 (3) then lays down that the Income-tax Officer shal hear the evidence which the person may produce and such other evidence as the Income-tax Officer may require on specified points and shall then assess the total income of the assessee and determine the assessment.

Section 23 (4) lays down that if the person fails to make a return under sub-section (2) of section 22, or fails to comply with the terms of a notice issued under sub-section (4) of section 22, or fails to comply with the terms of a notice issued under sub-section (2) of section 23, the Income-tax Officer shall make the assessment to the best of his judgment.

The question that arises, therefore, is, whether the provisions of section 22 (4) are available to the Income-tax Officer after action has been taken under section 23 (2). There can be no doubt that no time limit is fixed in section 22 (4), but it seems to me that section 22 (4), from its place in the section, would seem to confer a power on the Income-tax Officer to secure a correct return, while sections 23 (2), 23 (3) and 23 (4) give power to the Income-tax Officer to secure a correct assessment; and, if the general scheme of the Act supports this, there would be automatically a time limit placed on the operation of section 22 (4).

I proceed now, however, to point out certain difficulties arising owing to the peculiar drafting of section 23 (2). In the first place, as the section reads, an alternative power is conferred on the Income-tax Officer either to demand the attendance of the person making the return or requiring him to produce any evidence on which such person may rely in support of the return. The form of the notice issued under this sub-section, however, appears to suggest that the power is not alternative but that both things can be demanded by the Income-tax Officer, and I see no reason why the power conferred should be in the alternative at all. I doubt very much whether it was the intention of the Legislature that the Income-tax Officer should only be able to demand one of the two things. Nevertheless the drafting of the section seems clearly to imply that the power is in the alternative.

Next, if the person attends and refuses to do anything else, it would seem that the power of the Income-tax Officer is exhausted and surely this cannot possibly have been the intention of the Legislature. Assuming, however, that the Income-tax Officer has acted on the second alternative, it would still appear on a plain grammatical construction of the section that the person making the return need not produce any evidence at all for, the section states that the Income-tax Officer can only compel the person to produce that evidence on which the person may rely and the person, by simply stating that he has no evidence on which he relies, would appear to have performed all that is required by the section. Now, of course, if the section were interpreted to mean that it was for the benefit of the person attending that the Income-tax Officer was required to give the notice under section 23 (2), the matter would be perfectly plain, but then section 23 (4), states that a failure to comply with the terms of a notice under sub-sec-

tion (2), penalizes the person making the return, as laid down in that section. It would seem, therefore, that section 23 (2) is not purely for the purpose of benefitting the person making the return but also imposes a liability on him, failure to comply with which leads to the penalty of arbitrary assessment and loss of the right of appeal. It is difficult to see what the object of making the section penal can be unless the section is interpreted to mean that the Income-tax Officer can demand the person's attendance for the purpose of examining him and that the Income-tax Officer can further demand that person to produce all that evidence, not on which the person himself relies as a matter of fact but all that evidence on which the person might or could rely if his return were a correct return. In other words that the Income-tax Officer would be empowered to demand from the person making the return such account books and so on, as would go to prove his return correct if, as a matter of fact, that return were correct.

I am fully aware that this construction involves interpreting the word "may" in the section as if it were "might". But, as pointed out, it is difficult to make sense of the section without some such interpretation. If then this construction is the correct one, it is obvious that section 23 (2) confers practically the same power as section 22 (4) so far as it serves to secure evidence on which the Income-tax Officer may come to some conclusion as to the assessment to be made, and it would follow, therefore, that section 22 (4) could not apply after a notice had been given under section 23 (2). To my mind it seems to stand to reason that this should be so, for it may be in a particular case that the Income-tax Officer would like a return from a certain person whom he considers possibly liable to pay income-tax. If the return is made, the Income-tax Officer may or may not be in a position to judge of its correctness or completeness. If it is not possible so to judge, section 22 (4) gives power to make the person making the return himself supply the means whereby the Income-tax Officer may come to some conclusion on the point. It may happen then that, even if the person making the return has furnished such evidence, the Income-tax Officer may, either on that evidence or on extraneous evidence, doubt the correctness or completeness of the return. If this case arises then the Income-tax Officer is empowered by section 23 (2) to cause the person making the return either to attend in order, I take it, to explain his return and the evidence furnished under section 22 (4), or to produce all that evidence which, in the opinion of the Income-tax Officer, would support the return, if produced by the assessee. The Income-tax Officer has also power to cause evidence to be produced himself and by this means a judicial case is set up by which the Income-tax Officer may arrive at a correct conclusion for the purposes of assessment. In other words, while section 22 (4) confers power to secure a correct return, section 23 (2) confers power to secure a correct assessment. From this it would follow that section 22 (4) must have been exhausted before section 23 (2) comes into operation.

Of course a case may arise where section 22 (4) has never been used at all. In such a case the power conferred by section 23 (2) would, for all practical purposes, secure what might have been got by section 22 (4), but the difference between the two sections would nonetheless remain. The Legislature may very well seek to penalise the person who, although making a return, furnishes no means by which the Income-tax Officer may judge the correctness and completeness of the return; but where the Income-tax Officer relies on something other than the return and the evidence furnished by the person making the return in coming to the conclusion that the return is incorrect or incomplete, the Legislature provides for a quasi-judicial enquiry into the matter and it would seem that the only

penalty that should be inflicted in such a case is where the evidence on which the Income-tax Officer could come to a correct conclusion as to the return, is in the hands of the person making the return and that person refuses to furnish the Income-tax Officer with that evidence. The Legislature might, in my opinion, here again seek to penalise such a person by arbitrary assessment. In all other cases it would seem to me that the person cannot be arbitrarily assessed, but, of course, it is open to the Income-tax Officer on the materials at his disposal to come to some conclusion as to what the assessment of such a person should be, independently of the return made by such a person.

Where, however, he had complied with the terms of a notice under section 23 (2) it is difficult to see how action could then be taken under section 22 (4). In the case in question the matter would have been only of academic interest, for the finding of fact by the Income-tax Officer is that the person did not comply with the terms of the notice under section 23 (2), that is to say, if my interpretation of the sections is correct. However, as a matter of fact, in this case the Income-tax Officer did not purport to take action for failure to comply with the terms of section 23 (2), but took action for failure to comply with the terms of section 22 (4) and, if my interpretation is correct, the time limit for section 22 (4) was passed. The matter is not entirely of academic interest in other cases, for as pointed out, if a person had complied with the terms of a notice under section 23 (2), no arbitrary assessment would be possible for failure to comply with the terms of section 22 (4). As section 23 (2) stands at present, there might be difficulty in holding that there was any failure to comply with it in the present case and this would practically relieve the person making the return from all liability to arbitrary assessment. It is also possible, of course, to hold that section 22 (4) continues to operate even if the notice has been given under section 23 (2), but it seems to me that on the suggested interpretation such a power would be redundant and leads to the inequity mentioned in the judgment of my Lord, the Chief Justice. I may further point out that whereas, under section 22 (4), no limit is fixed for the account and documents required to be produced by the Income-tax Officer other than given in the proviso to the sub-section, under section 23 (2) only that evidence can be called for on which the person could rely or might rely in support of the return. This would be a question which might considerably limit the powers conferred under that section.

On the whole, therefore, if the matter were *res integra*, I would be of opinion that section 22 (4) cannot be used after a notice has issued under section 23 (2) and that the answer, therefore, to the first question referred should be in the negative. I am, however, greatly constrained by the weight of authority on the point which is now all the other way and in my opinion, the Legislature should intervene and place the question beyond reasonable doubt.

If the interpretation suggested by me is correct, then obviously the sections need re-drafting. If the other interpretation is correct then also the sections need re-drafting and, as pointed out, injustice may arise in certain cases and when such heavy penalties as arbitrary assessment and loss of the right of appeal are concerned, care should be taken to remove or lessen the chances of such injustice. In face of the authorities, however, I am reluctantly compelled to answer the first question in the affirmative.

As regards question No. 2, I have nothing to add to the judgment of my Lord, the Chief Justice, and I respectfully agree with his decision.

PRIVY COUNCIL.

(415) ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Present :

Lord Atkin, Lord Russel of Killowen and Sir John Wallis.

(16th December, 1930.)

The Commissioner of Income-tax, Bombay. *Appellant.*

v.

The Remington Typewriter Company (Bombay) Ltd. *Respondent.*

Income-tax Act (XI of 1922), Secs. 40, 42 and 43—Indian Companies formed by non-resident company—Non-resident company holding all the Indian Companies' shares—Profits of Indian Companies paid as dividend to non-resident company—Assessment on Bombay Company as 'agent' of non-resident company—Legality of assessments—Business connection, if exists.

The Remington Typewriter Co., of New York formed three limited companies in India—The Remington Typewriter Co. (Bombay) Ltd., The Remington Typewriter Co. (Madras) Ltd., and the Remington Typewriter Co. (Calcutta) Ltd.—and sold to them the business of selling its typewriters and goods in their respective areas, the consideration for the sale being the allotment of all their shares to the New York Company. The business of these subsidiary Indian Companies was to purchase typewriters from the New York Company at the usual wholesale discount prices and to sell them in India, the profits arising therefrom, less income-tax, being distributed as dividends to the New York Company. The Income-tax Officer alleging that besides the dividends, the New York Company had made a manufacturer's profit of 5% on the sale of its goods, assessed the Bombay Company as agent of the New York Company under Section 42 of the Income-tax Act, to income-tax and super-tax in respect of this manufacturer's profit and to super-tax on the dividends payable to the New York Company on its shares in the three Indian Companies.

On a case stated under Section 66 (2) of the Income-tax Act the High Court was of opinion that the Bombay Company although an 'agent' of the New York Company within the meaning of Section 43 could not be assessed under Section 42 (1) as the former was not in receipt of profits or gains on behalf of the latter company. On an appeal by the Crown to the Privy Council.

HELD, that having regard to the flow of business and the ultimate and complete control by the New York Co., a business connection existed between the companies whereby the Bombay Co., could be held to be "agents" of the New York Co., under Section 43 and that the Bombay Co., was properly assessed as agents under Section 42 (1) in respect of the profits or gains in question which accrued or arose to the New York Co., directly or indirectly from the business connection in British India.

Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd., *4. I. T. C. 312. Applied.*

Judgment of the High Court reversed.

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* (1931) 55 Bom. 243; 58 I. A. 42; 35 C. W. N. 349; 33 B. L. R. 413; 60 M. L. J. 609; A. I. R. (1931) P. C. 42.

Appeal (Privy Council Appeal No. 42 of 1929) against the judgment of the High Court of Bombay (Marten C. J. and Kemp J.) dated the 20th March 1928 on a reference by the Commissioner of Income-tax, Bombay, under Section 66 (2) of the Indian Income-tax Act (XI of 1922) and reported as 3 I. T. C. 166.

Dunne K. C. and *R. Hills*, for the Appellant.

Sir Patrick Hastings K. C. and *J. H. Stamp*, for the Respondents.

JUDGMENT.

LORD RUSSEL OF KILLOWEN :—The dispute in this appeal has, by reason of a recent decision of their Lordships' Board, been reduced to small compass.

A statement of the relevant facts is, however, necessary.

Assessments, in respect of the two financial years 1924-25 and 1925-26, were made under the Indian Income-tax Act, 1922 (hereinafter referred to as the Act), upon the Remington Typewriter Company (Bombay), Limited, as agent for the Remington Typewriter Company of New York. This last-mentioned company is a company incorporated in the United States of America and carries on the business of manufacturing and selling the well-known Remington typewriting machine. These two Companies may be conveniently referred to as the Bombay Company and the American Company respectively.

The assessments were made in respect of (1) dividends paid by two Indian Companies, *viz.*, the Remington Typewriter Company (India), Limited and the Remington Typewriter Company (Madras), Limited, to the American Company in respect of its shareholding in the two Indian Companies, (2) dividends paid by the Bombay Company to the American Company in respect of its shareholding in the Bombay Company; and (3) profits presumed to have been made by the American Company on the sales of its typewriters to the other three companies.

The Bombay Company was registered under the Indian Companies Acts on the 19th December, 1921, with a capital of Rs. 600,000, divided into 60,000 shares of Rs. 10 each, its principal object being to enter into and carry into effect the agreement next mentioned. By an agreement dated the 18th January, 1922, the Bombay Company bought from the American Company the goodwill of its business in a territory therein defined, which included the Bombay Presidency, Central Provinces and certain other adjoining portions of India. The consideration for the sale was the sum of six lakhs to be paid and satisfied by the allotment to the American Company or its nominees of 60,000 fully-paid shares in the Bombay Company. The purchase was duly completed, and the American Company holds all the shares of the Bombay Company with the exception of three shares, each of which stands in the name of a nominee of the American Company.

As regards the other two Indian Companies the position as between them and the American Company is in substance the same, their respective business territories between them covering the rest of India.

The sections of the Act with which this appeal is principally concerned are the sections which constitute Chapter V of the Act dealing with "Liability in Special Cases"; in particular sections 40, 42 and 43.

Section 40 deals with the case of a guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India being in receipt on behalf of such person of any income, profits or gains chargeable under the Act.

Section 42 (1) deals with the case of profits and gains accruing or arising to a person residing out of British India directly or indirectly through or from any business connection or property in British India. It provides that such profits and gains shall be deemed to be income accruing or arising within British India and that they shall be chargeable to income-tax in the name of the agent of any such person.

Section 42 (2) deals with the case of certain persons not resident in British India carrying on business with persons resident in British India, where the course of business between the two is so arranged that the business done by the resident in pursuance of his connection with the non-resident produces to the resident either no profits or less than the ordinary profits which might be expected; and it provides that the profits derived therefrom or which might reasonably be deemed to have been derived therefrom shall be chargeable to income-tax in the name of the resident.

Section 43 provides (amongst other things) that any person having any business connection with a person residing out of British India, upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person, shall for all the purposes of the Act, be deemed to be such agent.

The Bombay Company, under Section 66 of the Act, required the Commissioner of Income-tax, Bombay, to refer to the High Court certain questions of law. The Commissioner accordingly drew up a statement of the case and referred it, with his own opinion thereon, to the High Court.

The questions so referred were in the following terms:—

1. Whether the profits of the Remington Typewriter Company of New York upon goods exported to British India are or can be held to be chargeable to income-tax and super-tax under Section 42 (1) of the Act or otherwise.

2. Whether super-tax upon dividends received by the Remington Typewriter Company of New York from the Remington Typewriter Company (Bombay), Limited, the Remington Typewriter Company (India), Limited, and the Remington Typewriter Company (Madras) Limited, can under Section 42 (1) of the Act or otherwise be charged against and collected from an agent.

3. Whether the Remington Typewriter Company (Bombay) Limited, is or can be held to be the agent of the Remington Typewriter Company of New York under Section 43 of the Act.

In answer to the reference, the High Court (Marten C. J. and Kemp J), on the 20th March, 1928, made the following order:—

For the reasons stated in the accompanying Judgment the Court gives the following answers to the questions submitted to it.

Questions I and II.—The Bombay Company, though an Agent of the American Company within the meaning of Section 43 of the Act, cannot be assessed to income-tax or super-tax under Section 42 (1) of the Act or otherwise in respect of any profits made by the American Company on the sale of its goods to the Bombay Company, inasmuch as the Bombay Company was not in receipt on behalf of the American Company of the profits in question as is requisite under Section 40. For similar reasons, the Bombay Company is not liable to be assessed to super-tax upon dividends paid to the American Company by the Calcutta Company or the Madras Company; nor upon dividends of its own shares paid by it to the American Company. Super-tax upon dividends in the Bombay Company can be recovered by deduction by the Principal Officer of the Bombay Company under Sections 57 and 58 of the Act.

Question III.—Yes.

From this it appears that the High Court's view was that the Bombay Company, although an agent of the American Company within the meaning of Section 43 of the Act, could not be assessed in respect of profits or gains accruing or arising to the American Company, and covered by the description used in Section 42 (1) of the Act, unless the Bombay Company had been in receipt thereof on behalf of the American Company. In other words, the High Court held that the word "agent" in Section 42 (1) was used in the same sense as that in which the word "agent" is used in Section 40, *viz.*, a person who receives the profits and gains. In adopting this view, the High Court followed an opinion which they had already expressed in a previous reference made to them at the requirement of the Bombay Trust Corporation Limited. See *The Bombay Trust Corporation Limited v. The Commissioner of Income-tax, Bombay.* (1)

In that case a Hongkong Company had advanced to the Bombay Trust Corporation, Limited, large sums on deposit at interest. The Corporation was assessed as agent of the Hongkong Company in respect of the payments of interest on the sums advanced. The High Court, while holding that the interest paid was a profit or gain accruing or arising to the Hongkong Company from a business connection in British India within Section 42 (1), also held that though the Corporation was to be deemed the agent of the Hongkong Company under Section 43, it could not be assessed in respect of the interest because it had not been in receipt of it as required by Section 40.

This view of Sections 42 (1) and 43 must now be treated as erroneous. An appeal from the order of the High Court in the last-mentioned case was brought before their Lordships' Board last year, and the appeal was allowed upon the ground that any person who comes within the terms of Section 43 is put by that section artificially into the position of agent and assessee under Section 42 (1). *The Commissioner of Income-tax, Bombay v. The Bombay Trust Corporation Ltd.* (2)

That decision of the Board concludes the present appeal if the facts of this case establish (a) that the profits or gains in question accrued or arose to the American Company "directly or indirectly through or from any busi-

(1) 3 I. T. C. 135. (2) 4 I. T. C. 312.

ness connection .. .. in British India," and (b) that the Bombay Company had "any business connection" with the American Company.

Upon this part of the case the affirmative answer given by the High Court to Question III was based upon the view that the necessary business connection existed in the present case.

Although no appeal was lodged by the respondents against that part of the High Court's order, their Lordships took the view that the appellant's appeal raised for consideration the correctness of every part of the High Court's order. The question whether the necessary business connection existed was accordingly argued before the Board.

As a result of that argument their Lordships feel no doubt that the answer given by the High Court to Question III was correct.

The Bombay Company was formed for the express purpose of acquiring from the American Company and carrying on in a particular area the American Company's business of selling the American Company's manufactures.

Although no contractual obligation exists by which the Bombay Company is compelled to purchase any of the manufactures of the American Company, the flow of business between the two Companies is secured by the fact that the ultimate and complete control of the Bombay Company is vested in the American Company which owns all its shares.

It is not a question whether the Bombay Company is in law the agent of the American Company. The question is whether the facts of the case are such that the Bombay Company can properly be deemed to be such agent, under Section 43. The answer depends upon whether in this case a business connection exists within the meaning of that section. For the reasons appearing above their Lordships are of opinion that it does.

For the same reasons their Lordships think that a business connection exists in the present case within the meaning of Section 42 (1), not only between the Bombay Company and the American Company, but also between the American Company on the one hand and each of the two other Indian Companies on the other hand.

The necessary business connection having thus been established, there can, in their Lordships' opinion, be no doubt that the profits and gains in question accrued or arose to the American Company "directly or indirectly through or from a business connection in British India."

For these reasons their Lordships are of opinion that the appeal succeeds, and in their Lordships' view, the correct form of order to make in this and similar cases is to amend the order of the High Court so as to bring it into conformity with the decision of the Board.

The order of the High Court should be amended so as to run thus:—

"The Court gives the following answers to the questions submitted to it:—

Question I.—Yes, under Section 42 (1) of the Act.

Question II.—Yes, under Section 42 (1) of the Act.

Question III.—Yes.

The Court directs that the Commissioner do recover the costs of this Reference and that the costs be taxed by the Taxing Master as on the original side scale."

The respondents must pay the costs of this appeal. A petition by the appellant for the admission of a supplemental record was not opened before their Lordships. This will be dismissed with costs to be set off against the costs of the appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the Appellant :—*Solicitor, India Office.*

Solicitor for the Respondents :—*Ranger, Burton and Frost.*

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(416) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

(17th December, 1930.)

A. KR. PL. A. Chettyar Firm .. *Assessees**

v.

The Commissioner of Income-tax, Burma. .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sections 23 (4), 27 and 66 (2)—Assessment on non-production of accounts—Refusal to re-open by the Income-tax Officer and Assistant Commissioner—Proper question of law, framing of.

Where an application under Section 27 of the Income-tax Act to cancel an assessment under Section 23 (4) for non-production of accounts called for, was refused by the Income-tax Officer and by the Assistant Commissioner on appeal and on application under Section 66 (2) the Commissioner referred the question "Was the discretion given by Section 27 properly exercised in the case ?"

HELD, that the sole question of law arising out of the order of the Assistant Commissioner was whether there was any evidence upon which he could find that there was no sufficient cause preventing the assessee from producing the accounts and that the Commissioner had not propounded the question in the proper form.

Case [Civil Reference No. 15 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

On the application of the A. KR. PL. A. Chettyar concern, Rangoon, hereinafter referred to as the assessee, the following case is stated for the deci-

* (1931) 9 Rang. 21; A. I. R. (1931) Rang. 97.

sion of the High Court under the provisions of Section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922).

2. The facts of the case relevant to the question at issue are as follows:—

The assessee is a Hindu undivided family carrying on the business of money-lending at Rangoon and also at Hsipaw and Kyaukme in the Shan States. The Rangoon business is managed by a member of the family. The business at Hsipaw and Kyaukme are managed by paid agents. The assessment of the family in respect of the profits from all these businesses is made at Rangoon, which is its principal place of business. For the assessment for the year 1929-30, the manager of the Rangoon business, after having been duly served with a notice under Section 22 (2) requiring him to furnish a return showing the total income of the family, was requested by a notice under Section 22 (4) to produce the accounts of the Rangoon, Hsipaw, and Kyaukme business. This notice, which was served on the 18th May, 1929, required the production of the accounts at Rangoon on the 10th June, 1929. The accounts were not produced on that date and an adjournment was granted. Subsequently the assessee secured several further extensions of time for the production of the accounts, first on the plea that the accounts of the Rangoon business had not been compiled and then on the ground that those accounts had been submitted to the Civil Courts. Finally, on the 16th October 1929, the Income-tax Officer, in allowing a further extension of time up to the 5th November 1929, for the production of all the accounts, warned the assessee that, if the Rangoon accounts were not available by the 5th November, 1929, the accounts of the Hsipaw and Kyaukme businesses should, in any event, be produced; and that, if he failed to produce the accounts on or before the date specified, the assessment would be made under Section 23 (4) of the Act, the provisions of which become applicable when there is non-compliance with the terms of a notice under Section 22 (4). On the 5th November 1929, the assessee's clerk appeared with the Rangoon accounts only and applied for two months' extension of time for the production of the Shan States accounts. Time was allowed by the Income-tax Officer up to the 20th November 1929. The Shan States accounts were not produced on that date, the plea put forward by the assessee's representative being that a reference had been made to the proprietors in India about these accounts, and that no instructions had been received. A further extension was refused and the Income-tax Officer proceeded to make the assessment without the accounts, and passed his order under Section 23 (4) on the 22nd November 1929. The assessee then applied to the Income-tax Officer under Section 27 for the assessment to be re-opened. This application was dismissed. A copy of the Income-tax Officer's order, dated the 7th March, 1930, is attached and marked Annexure A.* The assessee thereupon preferred an appeal against the Income-tax Officer's order to the Assistant Commissioner under Section 30 of the Act and the appeal also was rejected. A copy of the Assistant Commissioner's order, dated the 28th March 1930, is attached and marked Annexure B.*

3. In the present application I am asked to refer to the High Court the following questions which are said to arise from the proceedings:—

(1) Whether, considering all the circumstances of the case, the petitioner was prevented by sufficient cause from producing the Shan States accounts; and whether the officer was justified in making the assessment under Section 23 (4).

* Not printed.

(2) Whether the officer was justified in declining to examine the Rangoon accounts at all because the Shan States accounts were not produced, considering the independent character of the two branches.

(3) Whether an assessment of Rs. 1,20,000 by a mere computation and without details when assessee showed a loss, is a best of judgment assessment under Section 23 (4) of the Act, or, on the other hand, considering the reasoning of the Officer, a penal assessment.

Section 66 (2) provides for a reference to the High Court of any question of law arising out of an order under Section 31 or 32, *i.e.*, an appellate order. The second and third questions reproduced above do not arise out of the Assistant Commissioner's appellate order, dated the 28th March 1930. In fact the second question was not raised in the appellate proceedings at all. The third question cannot, and in fact does not, arise from the the appellate order, since the assessment having been made under Section 23 (4), there is no appeal against the assessment as such, *vide* the proviso to Section 30 (1) of the Act. Thus neither of these two questions can form the subject of a reference under Section 66 (2) of the Act.

As regards the first question, which is directed against the validity of the order under Section 27. this Honourable Court in a similar case *P. K. N. P. R. Chettyar Firm* v. *The Commissioner of Income-tax, Burma*[1] held, with regard to the provisions of Section 27, that the determination of the sufficiency of cause involves the exercise of a judicial discretion, and that the question whether such a discretion has been properly exercised is a question of law. I accordingly refer the first question for the decision of the High Court in the following form namely,—"Was the discretion given by Section 27 properly exercised in this case ?"

4. My opinion on this question is that the discretion was properly exercised. A reference to the Income-tax Officer's order under Section 27 will show that he applied his mind to the question at issue and decided it rationally and reasonably and not "capriciously, arbitrarily or in a manner which is unsound." The Income-tax Officer, for the reasons recorded in his order, disbelieved the story regarding the belated attempt to produce the accounts, and, in my opinion, he was right in disbelieving it. The plea that the Shan States businesses, being under separate management, the member of the family at Rangoon had not unfettered control in respect of the accounts of these businesses, is one that carries no weight, since it was the assessee's income from all the businesses which was being assessed and it was for the assessee to make proper and adequate arrangements for the production of all the accounts. In point of fact he had six months in which to arrange for their production. Equally futile is the argument that the production of the Shan States accounts "assumed an importance only after the 5th November 1929. when the Rangoon accounts were produced, and a definite date was fixed for the Shan States accounts." These accounts were specifically called for in the notice issued on the 18th May, 1929. It is absurd to suggest, as this argument suggests, that, while the Department was insisting on the production of the Rangoon accounts, it was prepared to dispense with the Shan States accounts. The assessee was perfectly aware that both sets of accounts were required and he was given a reasonable opportunity and sufficient time for producing them. The plain fact of the matter appears to be that the assessee, having withheld the Shan States accounts for the previous assessments, with consequences apparently advantageous to himself, delibe-

(1) 4 I. T. C. 87 and 340.

rately elected to take yet another chance in the hope that the results would be equally favourable to him. As stated above, the question formulated should, in my opinion, be answered in the affirmative.

D. J. Daniel, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

This is a reference by the Commissioner of Income-tax, Burma, under Section 66 (2) of the Income-tax Act. The material facts are simple, and lie within a narrow compass.

It appears that the A. KR. PL. A. Chettyar Firm, Rangoon, are a Hindu undivided family carrying on a money-lending business at Rangoon, and also at Hsipaw and Kyaukme in the Shan States. The business is carried on as a whole, and in previous years has been assessed to income-tax as a whole. The Rangoon branch is managed by a member of the family, the branches at Hsipaw and Kyaukme by local agents. The manager of the Rangoon business as in previous years was duly served with a notice requiring him to furnish a return showing the total income of the family under Section 22 (2), and eventually on the 18th of May 1929 a notice was served upon the assessee under Section 22 (4) demanding the production of the accounts of the Rangoon, Hsipaw and Kyaukme branches of the business. Under the notice the assessee was required to produce the accounts in Rangoon on or before the 10th of June 1929. The assessee, however, did not comply with the notice duly served upon him under Section 22 (4). On several occasions an extension of time was granted to the assessee within which he was at liberty to produce the accounts of the several branches of the business. The assessee, when applying for those extensions, did not suggest that there was any difficulty in producing the Shan States accounts, but states that there had been difficulty in producing the Rangoon accounts, which it was alleged on one occasion had not been complied, and on another had been deposited in one of the Civil Courts. On the 16th of October 1929 the Income-tax Officer granted a further extension of time until the 5th of November, but at the same time he warned the assessee that even if the Rangoon accounts were not available on the 5th of November, at any rate the accounts of the Hsipaw and Kyaukme branches must be forthcoming on that date, and that in default he would be compelled to make an assessment under Section 23 (4) of the Act. On the 5th of November the assessee produced the Rangoon accounts but failed to produce the Shan States accounts, and applied for a further extension of time for two months within which to do so. The Income-tax Officer granted a peremptory extension until the 20th of November 1929. On that date, however, the Shan States accounts were not produced, and the pretext for their non-production was that the assessee's representative in Burma was in correspondence with the members of the firm in India with respect to these accounts, and that no instructions had been received as yet from India. In the circumstances, the Income-tax Officer refused to grant any further extension of time within which the assessee should be at liberty to produce the accounts and proceeded to make the assessment as best he could under Section 23 (4) of the Act.

It is to be observed that under the proviso to Section 30 (1) "no appeal shall lie in respect of an assessment made under sub-section (4) of Section 23, or under that sub-section read with Section 27."

The assessee then applied under Section 27 that the Income-tax Officer should cancel the assessment and proceed to make a fresh assessment, upon the ground that the assessee had been prevented by sufficient cause from complying with the notice issued under sub-section (4) of Section 22. The Income-tax Officer, having heard the assessee, in a considered order, held that no sufficient cause had been shown by the assessee preventing him from complying with the notice calling upon him to produce the Shan States accounts, and he dismissed the application under Section 27. From the refusal of the Income-tax Officer to cancel the assessment and proceed with a fresh assessment under Section 27 the assessee, under Section 30 sub-section (1), "objecting to the refusal of the Income-tax Officer to make a fresh assessment under Section 27" appealed to the Assistant Commissioner against such refusal. On the 28th of March 1930 the appeal was dismissed. In the course of his order the Assistant Commissioner held that "the appellant firm had had ample opportunity for making arrangements to produce the Shan States books. I can only attribute the failure finally to produce them to the deliberate intention of the appellant not to produce the books. I support the Income-tax Officer's refusal to set aside the assessment, and to make a fresh assessment."

The assessee thereupon applied to the Commissioner under Section 66 (2) that he should draw up a case and refer it with his opinion thereon to the High Court in respect *inter alia* of the following questions of law which he alleged arose out of the Assistant Commissioner's order passed under Section 31, *viz*:—Whether, considering all the circumstances of the case, the petitioner was prevented by sufficient cause from producing the Shan States accounts; and whether the officer was justified in making the assessment under Section 23 (4). The Commissioner granted the said application, and referred the first question for the decision of the High Court under Section 66 (2) in the following form: "Was the discretion given by Section 27 properly exercised in this case ?" It is this reference which we are invited to consider in Civil Reference No. 15 of 1930.

Now, as at present advised we should not be disposed to assent to the view that the question of law which arose out of the order of the Assistant Commissioner was propounded in the proper form. In our opinion the sole question of law which could arise out of the order of the Assistant Commissioner of the 28th of March 1930 was: "Was there any evidence upon which the Assistant Commissioner could find that there was no sufficient cause preventing the assessee from producing the Shan States accounts on the 20th of November 1929 ?" If any question of law could arise (contrary to the view that we take) as to whether in arriving at that conclusion the Assistant Commisioner properly exercised the discretion with which he was invested, it is abundantly clear that in passing the order of the 28th of March 1930 he exercised a thoroughly sound discretion in the matter. But in our opinion it is sufficient to dispose of this reference that we should hold, as we do hold, that there was ample evidence upon which the Assistant Commissioner could have arrived at the conclusion set out in the order of the 28th of March 1930. Indeed, the learned Advocate for the assessee frankly and properly conceded that there was evidence to justify the order that the Assistant Commissioner then passed.

In these circumstances no question of law arises, and we answer the reference in that sense. The assessee upon whose application the reference has been made must pay the costs of the Commissioner, the Advocate's fee being assessed at 10 gold mohurs.

(417) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

(17th December, 1930.)

A. KR. PL. A. Chettyar Firm *Assessees.* *

v.

The Commissioner of Income-tax, Burma.. .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sections 23 (4), 27 and 66 (2)—Assessment on non-production of accounts—Refusal to cancel assessment—Questions raising merits of assessment—Reference, if competent.

The Commissioner of Income-tax suo motu *or on assessee's application or otherwise cannot make a reference to the High Court as to the merits of an assessment under Section 23 (4) of the Income-tax Act or as to the validity of the notice calling for accounts, as questions arising from the appellate order under Section 30 (1) confirming the refusal of the Income-tax Officer to cancel the assessment under Section 27.*

Application [Civil Miscellaneous Application No. 129 of 1930] under Section 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Burma, to state a case for the opinion of the High Court.

D. J. Daniel, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

In Civil Miscellaneous Application No. 129 of 1930 the same assessee, in the circumstances which we have stated in the order that has been passed in Civil Reference No. 15 of 1930,* applied to the Commissioner of Income-tax under Section 66 sub-section (2) that he should state a case for the decision of the High Court with respect to the following further questions of law which he contended arose out of the order of the Assistant Commissioner of the 28th of March 1930:—

(a) Whether the Officer was justified in declining to examine the Rangoon accounts at all because the Shan States accounts were not produced, considering the independent character of the two branches ?

(b) Whether an assessment of Rs. 1,20,000 by a mere computation and without details when the assessee showed a loss is a best of judgment assessment under Section 23 (4) of the Act, or on the other hand, considering the reasoning of the Officer, a penal assessment ?

The Commissioner refused to state a case under Section 66 (2) in respect of either of these questions. The grounds upon which the Commissioner based his refusal were as follows:—"Section 66 (2) provides for a reference to the High Court of any question of law arising out of an order under Sec-

* (1931) 9 Rang. 25; A. I. R. (1931) Rang. 98.

* Reported at page 182.

tion 31 or 32, *i.e.*, an appellate order. The second and third questions reproduced above do not arise out of the Assistant Commissioner's appellate order, dated the 28th of March 1930. In fact the second question was not raised in the appellate proceedings at all. The third question cannot, and in fact does not, arise from the appellate order, since, the assessment having been made under Section 23 (4), there is no appeal against the assessment as such, *vide* the proviso to Section 30 (1) of the Act. Thus neither of these two questions can form the subject of a reference under Section 66 (2) of the Act." In these circumstances the assessee has applied to the High Court under Section 66 (3) for an order requiring the Commissioner to state a case in respect of the two questions of law set out above, and to refer them for decision to the High Court.

In our opinion the application is wholly misconceived, and must be dismissed.

As was stated in the order that was passed in Civil Reference No. 15 of 1930* the only question of law that could arise out of the order of the Assistant Commissioner of the 28th of March 1930 was whether there was any evidence upon which the Assistant Commissioner could base his order of the 28th of March 1930.

The order of the 28th March was made in an appeal under Section 30 (1) from a refusal of the Income-tax Officer under Section 27 to cancel the assessment and proceed with a fresh assessment, upon the ground that he was not satisfied that there was sufficient cause shown by the assessee preventing him from producing the Shan States accounts pursuant to the notice duly served on him in that behalf under Section 22 (4). In such an appeal the question whether the assessment was properly made or not was immaterial, and it was equally immaterial whether the notice, which admittedly was served upon the assessee, calling upon him to produce the Shan States accounts was valid or not. Neither of these two questions arose or could arise out of such order, and the learned Advocate for the assessee again frankly and properly conceded that that was so. In these circumstances there was no room for a reference to be made to the High Court in respect of such questions either by the Commissioner *suo motu*, or on an application duly made in that behalf by the assessee, or otherwise.

In our opinion this application is misconceived, and must be dismissed with costs. We assess the Advocate's fee at 5 gold mohurs.

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(418) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

(17th December, 1930.)

Dr. R. N. Singha. *Assessee*

v.

The Commissioner of Income-tax, Burma. *Referring Officer.*

Income-tax Act (XI of 1922), Section 10 (2)—Business expenses, Claim for—Non-production of vouchers—Disallowance, if legal.

Where the assessee manufacturing and selling a patent medicine was disallowed expenses claimed under (1) advertisement and samples, (2) "other

* Reported at page 182.

medicines" and (3) purchase of cartons, as assessee's own slips of paper but no vouchers therefor were produced and the High Court on the assessee's application directed a reference as to the legality of the disallowance, the Commissioner held that the Income-tax Officer was not justified in refusing to make any allowance where expenditure had been clearly incurred and the assessee was not in a position to prove it, provided there was some basis for making an estimate and that some allowance should have been made in respect of purchase of cartons.

Case [Civil Reference No. 23 of 1930] stated under Section 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax Burma, in compliance with the order of the High Court dated 4th September, 1930.

CASE.

In accordance with the order of the High Court in Civil Miscellaneous Application No. 1[illegible]3 of 1930, dated the 4th September 1930, the following case is stated, under Section 66 (3) of the Indian Income-tax Act, for the decision of the High Court.

2. The assessment concerned is the assessment for the year 1927-28 of Dr. R. N. Singha of Bassein (hereinafter referred to as "the assessee").

Several issues have been raised by the assessee in connection with this assessment, but in the High Court's order I have been directed to state a case on the following question only:—"When an assessee has incurred expenditure for the purpose of earning profits, but is not in a position to prove exactly what the expenditure is, is the Income-tax Officer justified in refusing to make any allowance for such expenditure, or is he bound to make as near an estimate as can be made under the circumstances ?"

3. The facts of the case are briefly as follows:—

The assessee manufactures and sells a patent medicine known as "Rinkilod". In the assessment for the previous year (1926-27), it was found that the accounts which he produced in respect of the receipts and expenditure of this business were incomplete and defective in several respects, the main defect being the absence of proper stock accounts. Accordingly, for that year (1926-27) the Income-tax Officer computed the profits of the business by taking a percentage of the sale proceeds of the medicine. In the subsequent year's assessment, that is, the assessment under consideration, the Income-tax Officer computed the profits on the basis of the accounts furnished by the assessee, with the following exceptions, namely (*a*) he excluded from consideration the stock balances as they were unverifiable, and (*b*) he disallowed certain items of expenditure in respect of which no vouchers or evidence of any sort could be produced. The exclusion of the stock balances is not in question. As regards the rest of the accounts, the Income-tax Officer took the figures of sales shown by the assessee, Rs. 33,408 and from this he allowed a deduction of Rs. 16,916 representing purchases of chemicals and other articles (*e.g.*, bottles, corks, etc.,) required for the preparation and sale of the patent medicine. He allowed a further deduction of Rs. 840 on account of the assessee's Calcutta agency. That is to say, from the total sale proceeds of Rs. 33,408 he allowed expenses amounting to Rs. 17,756, and took the balance Rs. 15,652, as profit. The following are the items which he disallowed.

		Rs.
(1)	Advertisements and samples ..	2,000
(2)	"Other" Medicines ..	1,000
(3)	Purchase of cartons ..	1,640

(An item on account of interest was also disallowed, but that is not in question.) In disallowing the items in question, the Income-tax Officer said: 'The assessee is a thorough business man, and from his statements and accounts I should conclude that if there were expenditure in respect of his business, he would insist for vouchers and preserve them, as he did for all items allowed in his assessment. I cannot admit those unsupported by vouchers, and merely evidenced by his own slips of paper."

It appears to me that what the Income-tax Officer wished but failed to emphasize here was that in allowing the sum of Rs. 17,756 he was, considering the nature of the business, admitting a very liberal amount as expenses, and did not feel justified in allowing anything beyond this unless it was clearly proved to have been incurred.

4. Turning to the question formulated by the High Court, in my opinion the Income-tax Officer is not justified in refusing to make any allowance where it is clear that expenditure has been incurred and the assessee is not in a position to prove it, provided that there is some basis for making an estimate.

In the present case, the Income-tax Officer was, in my opinion, clearly right in excluding any expenditure claimed under "Advertisements and samples" which was not proved. As regards the sum of Rs. 1,000 under "Other" medicines, the assessee did not produce, nor was he prepared to produce, vouchers in support of this alleged expenditure, his contention being that the production of vouchers might lead to the disclosure of his formula for the patent medicine. There was nothing to show that these "secret" medicines were used in the preparation of the patent medicine, and, even assuming that they were purchased, there was nothing to show that they were not charged for in the sum of Rs. 16,916. But even if the item stood alone it would be impossible for an assessing officer, without assistance from the assessee, to make an estimate of the cost of raw materials which bears no known ratio to the value of the finished article. In the circumstances the Income-tax Officer was justified in disallowing the expenditure. As regards the third item "Purchase of cartons", it is evident that expenditure was incurred under this head, and the Income-tax Officer should have made some allowance. The assessment will be revised in respect of this item.

D. J. Daniel, for the Assessee.

A. Eggar, for the Crown.

JUDGMENT.

In this case the Commissioner of Income-tax, Burma was directed to state a case relating to the alleged expenditure which the assessee stated that he had incurred in respect of his business, and which he claimed as a valid deduction from his receipts. The Commissioner on receipt of the order of the High Court took the proper course in the circumstances, and determined whether the items in question or any of them ought to be allowed as deductions from the receipts. His findings were findings of fact upon the evidence before him. His decision being one of fact the assessee is not at liberty to re-agitate these facts before this Court.

No question of law remains to be considered, and the opinion of the Court is not now required upon any matter in connection with which the reference was made.

There will be no order as to costs.

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(419) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

(22nd December, 1930.)

S. P. N. C. T. Chettyar Firm .. *Assessees*

v.

The Commissioner of Income-tax, Burma. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Sections 22 (2) and 63 (1)—Return notice—Assessee evading service—Service by affixture, if legal—Time for return, commencement of, from affixture date.

Where the notice under Section 22 (2) of the Income-tax Act was affixed on the door of the assessees' business premises by the Income-tax Inspector, who after several unsuccessful endeavours to serve the assessees found the assessees absent and could not get any information from the assessees' assistant and who was informed that the assessees intended to evade service.

HELD, that the affixture having been made after using all due and reasonable diligence to effect personal service, the assessees were duly served with the notice and that the prescribed period of 30 days commenced to run from the date of affixture, though the assessees personally received the notice subsequently.

Case [Civil Reference No. 21 of 1930] stated under Section 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma for the opinion of the High Court.

CASE.

Under Section 66 (2) of the Income-tax Act, 1922, the following case is referred to the High Court.

2. The Hindu undivided family (hereinafter called the 'assessee') consisting of S. P. N. C. T. Chidambaram Chettyar and his son carries on money-lending business at Moghul Street, Rangoon. On the 17th May 1930 a notice issued by the Income-tax Officer under Section 22 (2) of the Act was given to an Inspector of this Department for service on the assessee. By this notice the assessee was required to return his income for the 1930-31 assessment within 30 days from the date of receipt of the notice. The Inspector went to the assessee's place of business on the 20th May 1930 and on several other dates. An assistant on the premises refused to give him any information as to where assessee's agent could be found. The Inspector was told also that assessee's agent was avoiding service. In these circumstances he posted the notice on the door of the premises on the 9th June 1930 and made an affidavit as to the service before the Income-tax Officer who thereupon, on the 9th June 1930, declared that the notice was properly served (Section 63 (1) of the

Income-tax Act and Order 5, Rules 17 and 19, of the Civil Procedure Code). A copy of the affidavit and the Income-tax Officer's order is attached and marked A.*

3. No return was filed within the time specified in the notice and the Income-tax Officer therefore on the 12th July 1930, after the time limit for filing the return had expired made an assessment on the assessee under Section 23 (4) of the Act. In an application to the Income-tax Officer to set aside this assessment under Section 27 the assessee alleged that the proprietor and his clerk were away from Rangoon at the time the notice was served and that he had no knowledge of the notice until he found it affixed to his premises about the last week of June. The Income-tax Officer rejected this application. A copy of this order is attached and marked B.* An appeal against this order was rejected by the Assistant Commissioner. A copy of the Assistant Commissioner's order is attached and marked C.*

4. In these circumstances the assessee has asked me to refer the following questions to the High Court:—

(1) Whether having regard to the method of service in this case, the date when the notice was affixed to petitioner's premises can be held to be the date upon which the prescribed period of 30 days commences to run.

(2) Whether upon the facts the petitioner can in law be held to have been served with the notice on the 9th June, 1930.

(3) Whether the Assistant Commissioner was correct in law in holding that there was no force in the contention that the notice in this case should be deemed to have been served properly only on the date when the petitioner actually obtained the notice.

(4) Whether the Assistant Commissioner should not have satisfied himself as to the actual date on which the petitioner obtained the said notice.

5. This Department is not in a position to say that the statement of the proprietor that he did not see the notice until the last week in June is not true although the discrepancy between his statement and that of his clerk as pointed out in the Income-tax Officer's order (Exhibit B*) under Section 27 is suspicious. For the purposes of this case therefore it may be taken as the fact that the assessee did not actually receive the notice personally until the last week in June.

6. My opinion on the first question is that the period of 30 days specified in Section 22 (2) commenced to run from the 9th June 1930, the date on which the notice was affixed to the assessee's premises. In considering whether the assessee had actual knowledge of the notice and whether the information that the assessee was absent from the premises was correct, the Income-tax Officer had, within his knowledge, the facts that in the 1924-25 assessment the notice under Section 22 (2) had to be affixed to his premises as the process server could not serve the agent in spite of repeated attempts. No return was filed. In 1925-26, no return of income was filed in response

* Not printed.

to the notice under Section 22 (2). In 1926-27, the notice under Section 22 (2) had to be served by affixture as the assessee refused to accept it. No return of income was filed. In 1927-28, no return of income was filed in response to the notice under Section 22 (2). In 1928-29 and 1929-30, there were other defaults in respect of notices which necessitated non-appealable assessments under Section 23 (4).

As to the second question, I am of opinion that the notice was legally served on the assessee on the 9th June 1930. The conditions of Order 5, Rules 17 and 19, of the Civil Procedure Code, have been satisfied.

The third and fourth questions will be answered by the answer to the first question. In my opinion the answer to the third question is in the affirmative, and the answer to the fourth question is in the negative.

Foucar, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

In our opinion the application of the assessee to the Commissioner to refer the alleged questions of law to which our attention has been drawn was misconceived. The assessee was served with a notice under Section 22 (2) in 1925-26, but he made no return pursuant to it. In 1926-27 the notice under Section 22 (2) had to be served by affixture as the assessee refused to accept it; and in that year also he failed to make any return to the notice. In 1927-28, no return was filed in response to the notice served upon the assessee under Section 22 (2).

On the 17th of May 1930 a notice was issued by the Income-tax Officer under Section 22 (2) of the Income-tax Act to an Income-tax Inspector for service upon the assessee. It appears from the affidavit of the Inspector that he was personally aware of the house in which the assessee ordinarily resided, and that on the 20th of May 1930 he went to the assessee's house, 85-1, Moghul Street, but failed to find the assessee. On several occasions between 20th May and 7th June he endeavoured to serve the assessee with a notice, but on each occasion he found the assessee absent. There was an assistant of the assessee on the premises, but the Income-tax Inspector swore that the assistant refused to inform him where the assessee was on any of the occasions upon which he attended at 85-1, Moghul Street for the purpose of serving the notice upon the assessee. The Income-tax Inspector further swore that he was told that the assessee intended to evade service of the notice. According to the evidence of the managing member of the assessee firm, he became aware of the notice when he saw it affixed to the premises in the last week of June. No steps, however, were taken by the assessee thereafter to communicate with the Income-tax Officer, or to explain why it was that he would be unable to make a return to the notice which was duly served on the 7th of June upon the premises where the assessee resided and carried on business. As no return had been filed pursuant to the notice the Income-tax Officer on the 12th July 1930 made an assessment under 23 (4). An application to cancel the assessment and to make a fresh assessment under Section 27 was refused, and on appeal the Assistant Commissioner affirmed the refusal of the Income-tax Officer. The sole question of substance which arises upon this reference (as the learned Advocate for the assessee frankly and properly admitted) is whether before he affixed the copy of the summons on the door of 85-1, Moghul Street, the Income-tax Inspector had used all due and reasonable diligence to serve the notice personally upon the assessee.

In the circumstances obtaining in this case it would be idle to pretend that there was not ample evidence to justify the finding at which the Assistant Commissioner arrived in the present case. In our opinion the first 3 questions must be answered in the affirmative, and the fourth question in the negative. The assessee must pay the costs.

We assess the Government Advocate's fee at 5 gold mohurs.

(420) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

(22nd December, 1930).

T. S. T. S. Chettyar Firm .. *Assessees.*

v.

The Commissioner of Income-tax, Burma .. *Referring Officer.*

Indian Income-tax Act (XI of 1922), Secs. 34 and 23 (4)—Assessment under Sec. 23 (4)—Income escaping assessment—Notice for return of escaped income—Whole assessment, if to be re-opened—Jurisdiction limited to escaped income.

The assessees carrying on money-lending business inter alia *in Mandalay and Kywegyan, were assessed under Sec. 23 (4) of the Income-tax Act for non-submission of return of income for Mandalay business and non-production of certain accounts of the other business, the income of the Mandalay business being computed from the assessees' books deducting an item of Rs. 14,872 as interest payment on borrowed capital. Subsequently the Income-tax Officer suspecting this item to be assessees' capital served a notice under Sec. 34 calling for a return showing interest amounts paid on investments in Mandalay business. Thereupon the assessees submitted a return including the interest payment with a statement not objecting to assessment of this item if it had not been already done. On an assessment of this sum under Sec. 34.*

HELD, that it was not incumbent on the Income-tax Officer to re-open the assessment as a whole and to ascertain de novo *the whole assessable income and that the Income-tax Officer was authorised and bound to assess only the income, profits or gains that had escaped assessment.*

CASE.

I have the honour to refer the following case to the High Court under section 66 (2) of the Indian Income-tax Act, 1922.

The Hindu undivided family of T. S. T. S. Nagappa Chettyar and his sons (hereinafter called the assessee) carries on money-lending and other business in Burma and Madras and is assessed to income-tax in Burma. In Burma the businesses of the assessee are carried on in Rangoon Mandalay, Pegu and Kywegyan. When the Income-tax Officer came to make the assessment for 1927-28, he found that no return of income had been filed for the Mandalay business and that certain accounts for the Kywegyan business had been withheld. He therefore made a best judgment assessment under section 23 (4).

The income of the Mandalay money-lending business (out of which this case has arisen) was computed from the assessee's books by deducting

the expenses shown therein from the receipts and adding back certain inadmissible items of expenditure. The income of the Mandalay money-lending business computed in this way and brought into the assessment was Rs. 3,898. Amongst the expenses allowed was an item of Rs. 14,872 shown in the accounts as an interest payment on the Ramchandrapuram S. T. S. Streedhanam account.

The assessee sought to have the assessment under section 23 (4) set aside first under section 27, then under section 31 (appeal) and finally under section 33 (revision), but in none of these applications was he successful.

Subsequently, the Income-tax Officer came to suspect that the investment shown as Ramachandrapuram S. T. S. Streedhanam in the Mandalay accounts and on which interest amounting to Rs. 14,872 had been allowed in the assessment was not borrowed capital but the capital of the assessee. He therefore, on the 26th March 1929, issued to the assessee a notice under section 34 in respect of this amount. A copy of the notice is attached and marked A *.

In reply to this notice Muthiah Chettyar, who manages the affairs of the assessee, wrote on the 15th July 1929 that he was informed that tax had already been paid on this amount and he added "I have no objection to the said interest amount being taxed if it has not been already done so." The Income-tax Officer, having enquired into the matter, replied on the 15th February 1930 that the sum in question had not already been taxed. Thereafter, the assessee submitted a return showing the income already assessed and the sum of Rs. 14,872 which had escaped assessment. The return was accepted and the additional assessment made accordingly. A copy of this assessment is attached and marked B.*

The assessee appealed unsuccessfully against this additional assessment. A copy of the appellate order is attached and marked C.* Being dissatisfied with this decision, the assessee has asked me to refer the following two questions of law to the High Court:—(1) Whether the notice purporting to be issued by the Income-tax Officer under section 34 in this case was a good and valid notice under that section and if not whether the proceedings under section 34 are null and void. (2) Whether it was not incumbent upon the Income-tax Officer in his proceedings under section 34 to ascertain the whole assessable income of the assessee and then further to ascertain whether some portion of such income had or had not escaped assessment.

The notice issued by the Income-tax Officer is attacked on two grounds: (1) because it does not bear the seal of the Income-tax Officer and (2) because it does not call for a return of income from all sources but only for a return of a specified item of income. The assessee apparently considers that any departure from the form of notice prescribed by executive instructions in paragraph 82 of the Income-tax Manual, Volume I, is illegal. This form, however, has no statutory authority since it is not embodied in the Act or the Rules [section 2 (10)].

My opinion on this question is that the notice was a good and valid notice under section 34. The absence of the seal is of no material consequence. All that section 34 requires is that the notice should contain all or any of the requirements which may be included in a notice under section

* Not printed.

22 (2) and since the whole includes the part the notice in question complies with this provision. In point of fact a notice of this kind is more favourable to an assessee than the more vague notice which the Income-tax Officer was entitled to issue.

The second question in so far as there is any suggestion in it that income did not escape assessment is not correct since it is clear that the sum of Rs. 14,872 did in fact escape assessment and the assessee admitted this and made no effort to contest it. He could of course have contested the point and would have been given every facility to do so. But what apparently he contends for in this question is that he has a right in proceedings under section 34 to reopen the whole of his assessment which has already, with the exception of the item which has escaped assessment, become final. On this point I am of opinion that it was not incumbent on the Income-tax Officer to ascertain the whole assessable income and then to ascertain whether some portion of such income had escaped assessment. It was only incumbent on him to confine himself to the particular item which escaped assessment. On this point I rely on three recent judgments of Indian High Courts—*P. L. M. P. L. Palaniappa Chettyar* v. *Commissioner of Income-tax, Madras,*(1) *Seth Kasinath Bagla* v. *Commissioner of Income-tax, United Provinces,*(2) and *Satyendra Mohen Roy Choudhury* v. *Commissioner of Income-tax, Bengal.*(3)

Foucar, for the Assessees.

A. Eggar, for the Crown.

JUDGMENT.

Under section 66 (2) of the Income-tax Act (XI of 1922), the Commissioner of Income-tax, Burma, on the application of the assessee, has referred to the High Court two questions of law which it is alleged arose out of the order of the Assistant Commissioner of the 13th of May 1930. The first question that has been referred is not pressed, and need not further be considered. The second question is:—"Whether it was not incumbent upon the Income-tax Officer in his proceedings under section 34 to ascertain the whole assessable income of the assessee, and then further to ascertain whether some portion of such income had or had not escaped assessment."

The material facts are few and simple. The assessee, which is an undivided Hindu family carrying on money-lending and other business in Burma and Madras, was assessed to income-tax for the year 1927-28 in respect of the business which the assessee carries on in Rangoon, Mandalay, Pegu and Kywegyan. The assessee failed to produce the accounts for the Mandalay and Kywegyan branches pursuant to a notice duly served upon him in that behalf; and the Income-tax Officer proceeded to assess the income, profits or gains of the assessee to the best of his judgment under section 23 (4). The assessee then applied to the Income-tax Officer under section 27 that he should cancel the assessment and proceed to re-assess the income of the assessee. The application was refused. The refusal of the Income-tax Officer to re-open the assessment was affirmed by the Assistant Commissioner under section 31. An application in revision under section 33 also was dismissed.

Now, in the course of the assessment that the Income-tax Officer had made under section 23 (4) he had allowed a deduction from the assessable

(1) 4 I. T. C. 196. (2) 4 I. T. C. 472. (3) 4 I. T. C. 447.

income of a sum of Rs. 14,872 upon the footing that the sum represented interest upon capital which the assessee had borrowed and used for the purpose of his business. Subsequently, the Income-tax Officer, suspecting that the particular investment upon which interest amounting to the said sum of Rs. 14,872 had been allowed as a deduction in the assessment was not borrowed capital but money belonging to the assessee, on the 26th March 1929 served a notice upon the assessee under section 34 of the Act requiring him to deliver a return within 30 days of the receipt of the notice showing the amount of interest paid on the investment in the books of the Mandalay business.

The Assistant Commissioner found that in the course of the negotiations which took place in respect of this notice one of the members of the family whose income was liable to assessment had duly signed and returned a form "stating that the amount of interest might be ascertained from the Income-tax Officer, Mandalay, and assessed." In due course the Income-tax Officer, purporting to act under section 34, proceeded to make an assessment with respect to this sum of Rs. 14,872 upon the footing that it represented income, profits or gains chargeable to income-tax, and which had escaped assessment for the year 1927-28. The assessee thereupon appealed to the Assistant Commissioner against this additional assessment, but on the 13th of May 1930 the Assistant Commissioner confirmed the assessment and dismissed the appeal. The question of law that falls for consideration on this reference arose out of the Assistant Commissioner's order of the 13th of May 1930.

For the purpose in hand we proceed upon the footing that in fact the Income-tax Officer in making his assessment under section 23 (4) did allow as a deduction in favour of the assessee this sum of Rs. 14,872; that the deduction was improperly made; that this sum represented income chargeable to income-tax that had escaped assessment, and that the assessee admitted that this sum was liable to be assessed under section 34 of the Act. In those circumstances the assessee contends that it was incumbent upon the Income-tax Officer, before he proceeded to assess this sum of Rs. 14,872 under section 34, to reopen the assessment as a whole, and to ascertain *de novo* the whole assessable income of the assessee.

We are of opinion in the circumstances obtaining in the present case that the Income-tax Officer not only would not have been justified in so doing, but that if he had adopted the course which the assessee urges that he should have taken he would not have been complying with the provisions of section 34. Section 34 runs as follows:—"If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a Company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section." In our opinion it is clear beyond doubt or controversy that the income, profits or gains which the Income-tax Officer is authorised and bound to assess under section 34 is the income, profits or gains chargeable to income-tax that had escaped assessment in the year 1927-28. We answer the question of law propounded in the negative. The assessee must pay the Government Advocate's fee, 10 gold mohurs.

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421) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Justice Sir Alan ***Broadway, Kt.***, *Mr. Justice Dalip Singh and Mr.* ***Justice Tapp.***

(2nd January, 1931).

Feroze Shah Kaka Khel — *Assessee.**

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces, Lahore.

Income-tax Act (XI of 1922), Sec. 66 (3)—Letters Patent (Lahore) cl. 29—Application for reference—Order of dismissal—Appealability to Privy Council.

An order of the High Court dismissing an application under Sec. 66 (3) of the Income-tax Act to direct the Commissioner of Income-tax to state a case amounts to a final judgment and where the subject matter involved is Rs. 10,000 or more in value the applicant is entitled as of right to the certificate of leave to appeal to the Privy Council under Cl. 29 of the Letters Patent (Lahore).

Application [Civil Miscellaneous Petition No. 163 of 1930], for leave to appeal to the Privy Council from a judgment of Broadway and Tapp, JJ. dated the 28th November, 1929 reported as 4 I. T. C. 315.

Order of Reference to Full Bench.

BROADWAY, J.:—The petitioner K.S. Mian Feroze Shah Kaka Khel, applied to this Court under Sec. 66 (3) of the Income-tax Act, 1922, for an order directing the Income-tax Commissioner North-West Frontier Province, to state a case on certain questions in connection with his assessment for the year 1926-27.

This Court held that no questions of law were involved and dismissed the application.

The petitioner has now moved this Court under Clause 29 of the Letters Patent asking for the grant of a certificate for leave to appeal to His Majesty in Council.

Admittedly the provisions of Sec. 66-A of the Income-tax Act, 1922, do not apply and Mr. Petman for the Petitioner has rested his case solely on the Letters Patent and has urged that under Clause 29 leave to appeal should be granted for the reasons that:—(1) the sum at issue is more than Rs. 10,000, (2) it should be declared that the case is a fit one for appeal to the Privy Council.

As to the latter contention I may say at once that I am not prepared to certify the case as a fit one for appeal.

As to the first contention the relevant portions of Clause 29 are as follows:—"And we do further ordain that any person * * * may appeal to us * * * in our * * * * Privy

* (1931) 12 Lah. 166; A. I. R. (1931) Lah. 138.

Council * * * and from any final judgment, decree or order made in the exercise of original jurisdiction by * * * any Division Court from which an appeal does not lie to the * * * High Court * * * provided * * * that the sum or matter at issue is of the amount or value of not less than Rs. 10,000."

It has not been disputed that the sum involved in this matter exceeds Rs. 10,000 in value. It is also clear that the order refusing the application was made in the exercise of the Court's original jurisdiction.

It is true, as urged by Mr. Jagan Nath for the respondent, that this Court has no Original Side, but as was held by their Lordships of the Judicial Committee in *Tata Iron and Steel Co., Ltd.*, v. *The Chief Revenue Authority of Bombay,*(1) "the words 'original jurisdiction' are only used in contradistinction to the words 'made in appeal' mentioned earlier in the clause."

Mr. Jagan Nath then cited *Bulaqi Shah and Son v. Collector of Lahore,*(2) and *Delhi Cloth and General Mills Co., Ltd., v. Income-tax Commissioner, Delhi,*(3) and contended that as a decision on a case stated was not a "final judgment" (as was held in *Bulaqi Shah's case*) a refusal to grant a mandamus could not be held to be one, and that therefore clause 29 of the Letters Patent could not be invoked.

The question is not free from difficulty and in *Tehar Mal Uttam Chand v. The Commissioner of Income-tax,*(4) and *Siva Pratab Battadu v. Commissioner of Income-tax, Madras,*(5) it was held that an appeal lies from an order of a single Judge of the High Court refusing to ask the Commissioner to state a case apparently on the ground that such an order of refusal was a judgment.

These cases, however, did not touch the question now before us, but dealt with another clause of the Letters Patent.

After consideration it seems to me that none of the cases cited at the bar afford any real assistance. I am inclined to the view that the order of refusal is a final one and whether it be regarded as a 'final judgment' or a 'final order' falls within the purview of clause 29.

The question, however, is a difficult one and this view creates a somewhat anomalous position. I would, therefore, refer to a Full Bench the following question:—"In a case where the subject-matter involved is Rs. 10,000 or more in value, does the refusal to issue a mandamus give the applicant an appeal to the Judicial Committee as of right."

TAPP, J.:—I concur.

Govind Das, for the Assessee.

J. N. Aggarwal and *Amar Nath Chona*, for the Crown.

JUDGMENT.

BROADWAY, J.:—The question referred to this Full Bench is whether in a case where the subject-matter involved is Rs. 10,000 or more in value, does the refusal to issue a mandamus give the applicant an appeal to

(1) 1 I. T. C. 206. (2) 1 I. T. C. 401. (3) 2 I. T. C. 439 (4) 2 I. T. C. 301.
(5) 2 I. T. C. 40.

the Judicial Committee as of right? The circumstanees under which this question was referred are detailed in the order of reference dated 6th May 1930. Briefly, one Khan Sahib Mian Feroze Shah Kaka Khel moved this Court under Sec. 66 (3), Income-tax Act, 1922, for an order directing the Income-tax Commissioner of the North-West Frontier Provinces to state a case on certain questions in connexion with his assessment for the year 1927-1928, which assessment had been based on his income for the year 1926-1927. It was held that no question of law being involved the mandamus could not issue. Against this order refusing to direct the Income-tax Commissioner to state a case the petitioner desired to prefer an appeal to His Majesty in Council.

It was claimed that having regard to the provisions of Cl. 29, Letters Patent of this Court, the petitioner had a right to the certificate prayed for inasmuch as the sum involved exceeded Rs. 10,000. Mr. Jagan Nath, on behalf of the Income-tax authorities, urged that the order refusing to grant the mandamus was not a judgment passed on the original side of this Court, and further that it was not necessarily final. It has been held by a Division Bench of this Court in *Tehar Mal Uttam Chand* v. *Commissioner of Income-tax, Punjab,*(1) that an order of a single Judge of the High Court dismissing an application made under section 66 (3), Income-tax Act, on the ground that there was no question of law is a final judgment and is appealable under Cl. 10, Letters Patent. It is true that for the purpose of that case Cl. 10, Letters Patent, alone was considered and that it was not necessary to hold that the judgment was a final one. It was however clearly held that an order refusing a mandamus was a judgment, and in this view I concur. That the judgment refusing a mandamus was final is also to my mind perfectly clear. The only question for decision on an application under Sec. 66 (3), Income-tax Act, is whether a mandamus should or should not issue. A decision to the effect that it should not issue is therefore a final one so far as this Court is concerned. The refusal must therefore, in my opinion, be regarded as a final judgment. As pointed out in my order of reference the refusal of the application was made in the exercise of this Court's original jurisdiction. I would merely refer to *Tata Iron Steel Co., Ltd., v. Chief Revenue Authority, Bombay,*(2) and to the remarks already cited by me.

I would therefore hold that an order refusing to issue a mandamus must be passed by this Court on its original side and amounts to a final judgment, and that therefore the question referred should be answered in the affirmative.

DALIP SINGH, J.:—I agree.

TAPP, J.:—I agree.

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(1) 2 I. T. C. 301.

(2) 1 I. T. C. 206.

(422) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Macnair, Judicial Commissioner and Mr. Subhedar, Additional Judicial Commissioner.

(2nd January, 1931)

The Maharaj Bag Club Ltd. .. *Assessee*

v.

The Commissioner of Income-tax, Central Provinces and Berar .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 3, 4 (3) (i), 6 and 10—Social Club registered as company—Shareholders and outsiders members—Surplus subscription income, assessability of—Claim of exemption as voluntary contributions for charitable purposes.

The Maharaj Bag Club started for the promotion of the physical, intellectual and social well-being of respectable residents in India and registered as a company under Sec. 26 of the Indian Companies Act, consisted of 66 shareholders, 26 of them being members and 61 non-shareholders members paying monthly subscriptions. The Club was managed by three trustees and four members annually appointed from among the shareholders, all the properties, movable and immovable, vesting in and exclusively belonging to the shareholders. The Club declared no dividends, the surplus every year being accumulated.

On an assessment of the surplus of income over expenditure the Club contended that it had no income or profits assessable under the Income-tax Act and claimed exemption under Sec. 4 (3) (i) of the Act.

HELD, that the Club not being a mere mutual society, the surplus income, irrespective of its being income from business or not, was chargeable under Sec. 6 of the Act as income from other sources and was not exempt under Sec. 4 (3) (i), the members' subscriptions not being voluntary contributions applicable solely to charitable purposes.

Case [Miscellaneous Judicial Case No. 10 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Central Provinces and Berar for the opinion of the Court.

CASE.

The Maharaj Bag Club at Nagpur was started about the year 1904. Its object was the "promotion of the physical, intellectual and social well-being of respectable persons residents in India" (para 3 of the Memorandum of Association). Its capital consisted of Rs. 50,000 divided into 250 shares of Rs. 200 each. Of these shares, 78 had been sold till the end of December 1928 and were held by 66 persons. Article 3 of the Articles of Association states "All the property movable and immovable already acquired or hereafter acquired for the benefit of the Maharaj Bag Club either in the name of the trustees or otherwise shall vest in, belong to and be owned exclusively by the shareholders of the Maharaj Bag Club for the time being and they shall have full power to alter its constitution or to sell mortgage or otherwise transfer or dispose of it with or without conditions at their discretion subject to the right of pre-emption reserved to Ramchandra Gopal Bhide as

provided in the sale-deed executed by him in the name of the trustees and registered on the 22nd February 1904." From among the shareholders, 3 persons are appointed trustees of the Club property (Article 4) and the affairs of the Club are managed by a committee styled "The Managing Committee" composed of the three trustees and 4 members appointed annually from among the shareholders only (Article 14). A "Member" of the Club means a person who is a shareholder of the Club and whose name appears on the roll of persons paying subscription from time to time prescribed and who has paid the said subscription for an aggregate period of not less than one year whether he was or was not a shareholder when he paid the subscription (Article 2). Thus in the club there are persons who merely hold shares and are called "Shareholders" and "Members" who are shareholders and also pay the subscription. Besides these, the club takes outsiders also who are neither "shareholders" nor "members" but who pay monthly subscriptions of Rs. 5 or Rs. 8 a month according to the use they make of either tennis or billiards or of both. The only other game played in the Club is bridge for which no fee is charged. During the year ending in December 1928 there were 66 purely shareholders of the Club, 26 its members and 61 ordinary persons who merely paid monthly subscription for the use of the Club and the games therein and who by courtesy are also called members. Among those 61 persons, 5 were local members paying only Rs. 24 a year but not using the Club and 1 non-resident member paying only Rs. 12 a year. These 61 members have no interest in Club property. They have not even the right to vote in the affairs of the Committee. So to say they are only paying guests.

2. This Club was registered as a company under Section 26 of the Indian Companies Act on the 4th February 1910 and has for a long time been assessed as a company under the Income-tax Act. Hence in this statement it will be hereafter called "the company". It has declared no dividends so far and claims that as it is registered as a company, it is prohibited from declaring dividends or making profits and that the excess of receipts over expenditure is merely the "surplus income." For 1923-24 it returned its income only from the house property and was taxed on it. In 1924-25 it was assessed on this income as also the income derived from its "members"; but in appeal it seems to have been held that the income was "surplus" derived from activities which did not constitute business. Therefore upto 1928-29 the company was to be assessed on the income derived from property only. It was after that, that a complete enquiry came to be made by the Income-tax Officer and other income also came to be taken into account.

3. The company had been making profits every year and upto 31st December 1925 the accumulated profits amounted to Rs. 5,650. In 1926 the profits were Rs. 2,159-9-6, in 1927 they were Rs. 682-14-0 less Rs. 69-8-0 written off and in 1928, as shown below, they were Rs. 1,761-7-0. Though no dividends are declared these profits are added to the total assets of the company and the value of its assets increases and the company benefits thereby.

4. For assessment during the year 1929-30 the company returned an income of Rs. 590. This was the income from house property only and was calculated as

Annual rental value	..	Rs. 720
Less for repairs Rs. 120 Less for land revenue 10	..	Rs. 130
Net	..	Rs. 590

For reasons given in his assessment order dated the 19th September 1929 the Income-tax Officer held that there was no mutuality between the shareholders of the Company and the members of it paying subscriptions and therefore as the company was making income out of these members, that income was taxable. He therefore called for the accounts of the Club to be shown. From the profit and loss statement of the company filed, he calculated the taxable income for the year 1929-30 as

Rs.	5,505	received as subscriptions from members
,,	43-14-0	by sale of used tennis balls, etc.
,,	5,548-14-0	Total
,,	3,867-12-0	Total expenses
,,	1,681- 2-0	Balance.

This the company called surplus and as is its practice, it did not distribute it as dividend to the shareholders but added to its assets. The Income-tax Officer held that this so-called surplus was the income of the company and after disallowing the following, i.e., Rs. 55-5-0 income-tax debit and Rs. 25 auditor's fee, taxed the total income of Rs. 1,761-7-0.

5. Against this assessment an appeal was filed before the Assistant Commissioner which was rejected on the 2nd December 1929.

6. An application under section 66 (2) is now made to me and the following points said to be points of law are asked to be referred to the High Court :—

(1) That it should have been held that the Income-tax Act shall not apply to income derived from the property held under "Trust" or income which is applied for "Charitable purposes" under section 4 sub-section 3 (1) of the Income-tax Act. Therefore the income of the Maharaj Bag Club is exempted under section 4 sub-section 3 (1) of the Income-tax Act as the property is held under trust and the income is applied for "charitable purpose" as described in the last para of section 4 of the Income-tax Act.

(2) That it should have been held that Maharaj Bag Club is not carrying on business as mentioned in section 6 sub-section 4 of the Income-tax Act. A social club established with the object of promotion of physical, intellectual and social well-being of respectable persons and recovering subscription from its members and providing and fulfilling the objects for which it was established and not making any profits out of the income under law should be held not carrying business. That it should have been held that case quoted (i.e., *Dibrugarh Club case*) is not applicable to the facts of this case as in that case profits were divided and the club was not registered under section 26 of the Indian Companies Act.

(3) That it should have been held that as Maharaj Bag Club was registered under section 26 of the Indian Companies Act and the trustees of the Club having undertaken to apply its profits and other income in promoting its objects and prohibit the payment of any dividend to its members, and therefore not to make

any profits for itself and its members; therefore the income of the Maharaj Bag Club is not chargeable to income-tax.

(4) That it should have been held that Maharaj Bag Club was not liable to pay income-tax of any kind either on the immovable property of the Club or on its income.

It appears to me that the first three questions under consideration have been unnecessarily framed and to a certain extent overlap each other. The object of the company would have been gained if it had referred only question No. (4) which is the chief question at issue and which in a few words states the point of difference between the company and the Department. The first three questions are more or less the reasons for alleging that the company's income is not taxable. I therefore beg to submit only this question, i.e., question No. (4), for the decision of the High Court; but in my opinion below, I would try to meet the arguments of the company as mentioned in questions (1) to (3).

7. It is true that the Income-tax Act does not apply to any income derived from property held under trust or legal obligation wholely for religious or charitable purposes. It is also true that "Charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility (Section 4 (3) of the Income-tax Act). The question for consideration is whether this company is a trust for any such purpose. I am of opinion that it is not. Though Article 4 of the Articles of Association says: "The Shareholders shall for three years nominate and appoint from amongst their body three persons to be trustees of the Club property who shall hold office for three years only at the expiry of which they shall retire but shall be eligible for re-election," this stipulation cannot make the company a trust. It is only a kind of an arrangement by which three of the shareholders, by rotation, manage the property of the Club, i.e., the company. Such rules are always framed by the companies when they are floated. By making such a provision the company cannot be said to be held in trust for any charitable purpose; for according to Article 3 of the said Articles "all the property movable and immovable already acquired or hereafter acquired for the benefit of the Maharaj Bag Club either in the name of the trustees or otherwise shall *vest in, belong to and be owned exclusively by the shareholders of the Maharaj Bag Club for the time being*. . . . . " Thus trust cannot be said to have been created as regards the property owned by the members of the company. Nor is the object of the company a charitable one. It aims at promoting physical, intellectual and social well-being of respectable persons residents in India. The company is therefore meant only to promote the social well-being of a few respectable residents of India. It cannot therefore claim exemption under section 4 of the Income-tax Act.

8. It is not correct to say that the company is "not making any profit out of the income"; for, as the facts above have shown the company does make profits and has been making profits of the different amounts in different years as stated above. It only calls it as a "Surplus in income over the expenses." But this in itself means income or profits. The shareholders of the company are 66 and its members, i.e., 26 shareholders and 61 non-shareholders, all contribute towards its income and it is the company of the 66 shareholders that benefits by the contributions so made. The company itself is a distinct body from its members and as it makes a profit over the subscriptions received from its members after meeting the necessary expenses on games and establishment, etc., it is supposed to be doing business (*The*

Dibrugarh District Club, Ltd., vs. *The Commissioner of Income-tax, Assam,* [1] and *Liverpool Corn Trade Association* vs. *Monks* [2].

9. The registration of the company under section 26 of the Indian Companies Act does not take away its liability to pay income-tax. There is no section of the Income-tax Act exempting such income from taxation.

10. For reasons given above, I am of opinion that the company of the Maharaj Bag Club at Nagpur is liable to pay income-tax on the income it makes.

S. Y. Deshmukh, for the Assessee.
D. N. Choudhri, for the Crown.

JUDGMENT.

The Income-tax Commissioner under the provisions of section 66 of the Income-tax Act (XI of 1922) has referred, for the opinion of the High Court, a question of law. He states that the question is as follows :—"That it should have been held that Maharaj Bag Club was not liable to pay income-tax of any kind either on the immovable property of the club or on its income." This statement is not in the form of a question, nor does it, read by itself, indicate what points of law are involved: but as the statement of the case drawn up by the Commissioner is full, this defect of form does not prevent consideration of the arguments adduced before us.

2. The Counsel for the assessee first argues that the income of the Maharaj Bag Club is exempted under section 4, (3) (i), of the Income-tax Act. We do not think that the income of the Maharaj Bag Club can be said to be "income of a religious or charitable purposes." In the first place, the subscriptions of members of the Club cannot be termed "voluntary contributions": members pay subscriptions in order to enjoy the amenities of the Club. In the next place, the income cannot be said to be applicable solely to a useful object merely because it was the intention of the persons, who formed the limited company, that it should be so applied and because income has hitherto been so applied. The Articles of Association give the members of the Company full power to dispose of the income in any way they choose; apparently they may even, if they choose, pay a dividend; the only result of such payment would be that the Association would cease to enjoy the exemption of privileges granted by section 26 of the Indian Companies Act. Lastly, the income has hitherto been applied to the increase of the amenities of the Club, which may advance a useful object, but does not advance an object of general public utility.

3. The next point raised is that the Maharaj Bag Club is not carrying on business. We do not consider it necessary to decide whether the income is from business. It is not disputed before us that if it is not income from business, it is income from other sources and thus chargeable to income-tax under section 6 of the Income-tax Act.

4. The last point urged is that the money received by the Maharaj Bag Club from the members composing it cannot be regarded as income, a word which itself seems to imply something received from outside. Reliance is placed on *The United Service Club, Simla,* v. *The Crown* [3] but the

(1) 2 I. T. C. 521
(2) 10 Tax. Cas. 442
(3) 1 I. T. C. 113.

basis of this ruling is that the surplus of income over expenditure remained the property of the persons, from whom the income was derived. In the case of the Maharaj Bag Club, the majority of the persons, who provided the income, might be termed members of the Club, but were not members of the Company, whereas the excess of income over expenditure was, by the Articles of Association, at the disposal of the members of the Company. Although some of the facts considered in *Dibrugarh District Club, Ltd.*, v. *Commissioner of Income-tax, Assam,* (2) differ from those detailed in the statement of the Commissioner, the main reason for the decision in that case is applicable to the case we are considering: Rankin, C. J., stated at p. 523:— "The company dealt in 1926 with 220 members of the Club, who were not shareholders, i.e., with 220 persons not members of the company. The company is not a mere mutual trading society making '*quasi* profit' by trading with its own members and returning such 'profits' to the members." The facts considered in *The United Service Club, Simla,* v. *The Crown* (1) appear to be different. It may well be that the United Service Club, Simla, was a society making *quasi* profit by dealing with its own members and returning such profit to the members.

5. We, therefore, hold that the profits of the Maharaj Bag Club made during the year, to which this reference relates, were chargeable to income-tax under the provisions of section 4 (3) of the Act. The assessee will pay the costs of this reference. Counsel's fee Rs. 50.

6. The statement of the case and the arguments of Counsel show that the question of liability to pay income-tax on immovable property has not been referred.

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(423) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Justice Sir C. C. Ghose, Kt., and Mr. Justice Buckland.

(13th January, 1931)

Neemchand Daga .. *Assessee* *

vs.

The Commissioner of Income-tax, Bengal .. *Referring Officer*

Income-tax Act (XI of 1922), Secs. 2 (14) and 34—Escaped income of registered firm—Re-assessment proceedings against firm barred—Partner, if assessable on his share.

A partner of a registered firm whose profits escaped assessment in part can be assessed under Sec. 34 of the Income-tax Act in respect of his share of that part, when proceedings under the said section against the firm itself have failed for want of jurisdiction and fresh proceedings are time barred.

Case stated under Sec. 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

(1) 1 I. T. C. 113 (2) 2 I. T. C. 521

* (1931) 58 Cal. 1204; 35 C. W. N. 534; A. I. R. (1931) Cal. 686.

CASE.

The question of law, hereinafter stated, which is being referred for the decision of the Hon'ble High Court under sub-section (2) of section 66 of the Indian Income-tax Act (XI of 1922), arises out of the assessment of Neemchand Daga, hereinafter referred to as "the assessee."

2. The facts are that the assessee is a partner in the registered firm of Dulichand Thanmal, hereinafter referred to as "the firm". The firm was assessed for the year of assessment 1927-28 by the Income-tax Officer, District IV (2), Calcutta. The assessment was made by estimating net profit on turnover, the books being unadjusted and partly withheld. The Income-tax Officer did not levy the assessed tax upon the firm, but forthwith assessed and charged the partners direct on their respective shares in the firm's profits at the rate appropriate to the individual total income of each. This course was adopted for the convenience of the partners, to save them the trouble of applying for refund under sub-section (2) of section 48 of the Act. The assessee was assessed on the 31st October, 1927, on his share in the profits of the firm as computed in the assessment of the firm, it being found that he had no other income. No appeal was filed by the assessee. The firm appealed against the assessment of the firm, but subsequently withdrew that appeal. On the 13th December, 1927, the assessment of the firm for 1928-29 was transferred by my predecessor to the file of the Special Income-tax Officer, and that Officer, on the 30th November, 1928, made assessment on the firm for 1928-29. The assessments of the individual partners of the firm were not, however, transferred to the Special Income-tax Officer. In making the assessment of the firm for 1928-29 the Special Income-tax Officer was led by his examination of the books to the conclusion that, in the assessment for 1927-28, certain profits of the firm had escaped taxation. He therefore instituted proceedings against the firm under section 34, and, on the 26th February, 1929, re-assessed the firm for that year (1927-28) at an enhanced figure. The Income-tax Officer, District IV (2), evidently in consequence of information received from the Special Income-tax Officer, also instituted proceedings under section 34 against each partner in the firm in respect of his individual assessment for 1927-28. A notice under section 22 (2) read with section 34 was served upon the assessee on the 15th January, 1929. Subsequently to that date the appointment of the Special Income-tax Officer was decided by the Hon'ble High Court to be without jurisdiction, and, in consequence of that decision, my predecessor cancelled both the assessments which the Special Income-tax Officer had made on the firm, viz., the assessment for 1928-29 and the assessment for 1927-28 made under section 34. By that time the institution of proceedings under section 34 by the Income-tax Officer, District IV (2), for the rectification of the assessment of the firm for 1927-28 would have been out of time. That officer therefore proceeded to complete the proceedings instituted against each individual partner. In response to a reminder of his obligation under the above-mentioned notice, on the 20th March, 1930, the assessee made return showing the income previously computed by the Income-tax Officer in the original assessment. The return was submitted under protest and the jurisdiction of the Income-tax Officer to make the reassessment under section 34 was challenged. The Income-tax Officer disallowed the objection, and, not being satisfied that the return was correct, served upon the assessee a combined notice under sections 23 (2) and 22 (4). In compliance with that notice, the assessee produced the firm's books of account. The Income-tax Officer, after examining them and considering the notes recorded by the Special Income-tax Officer, computed the share of the assessee in the income of the firm at

Rs. 39,357-15-5, whereas, in the original assessment, the figure stood at Rs. 26,832. He also added interest of Rs. 15,776-7-0 and salary of Rs. 347-14-6 and made assessment on a total income of Rs. 55,484-4-11.

3. The assessee did not challenge the computation of income under any head, but appealed to the Assistant Commissioner on the following sole ground, as set out in his written petition of appeal. "The proceedings against the appellant drew life from the proceedings taken against the appellant in the Special Branch and depended upon the continuity of the latter proceedings. The proceedings against the firm were cancelled by the learned Commissioner, and were thus not available against the firm, and, with the collapse of the proceedings against the firm, the proceedings against the appellant should be deemed to have lapsed as well." The Assistant Commissioner of Income-tax found that the ground of objection was "that the partners could not be made liable to pay the tax when the assessment of the main firm was cancelled by the Commissioner under section 33." He decided this point against the assessee and confirmed the assessment. The assessee thereupon made a combined application under sections 33 and 66 (2). I have refused to interfere under the former section.

4. In the application under section 66 (2) the questions of law arising are framed by the assessee as follows :—

1. Whether a partner can be assessed for his proportionate share in the income of the firm of which he is a partner when the firm itself had not been assessed and had no assessable income.

2. Whether a notice which was issued proposing assessment of the income from business can be made the basis for revising the assessment of income arising from a partnership concern.

3. Whether section 14 (2) has been rightly interpreted to impose liability on a partner irrespective of all considerations of the assessability of the firm.

4. What is the legal procedure for assessing a partner of a registered firm? Has the procedure been correctly followed in this case as to make the assessment valid in the case?

5. These questions nowhere make explicit reference to the fact that the proceedings and the assessment objected were under section 34. It appears desirable that the question or questions referred should be based on the exact facts. I have therefore thought it advisable to recast the questions. Moreover Question (1) is based on a misstatement, viz., that the firm "had no assessable income."

6. Taking into consideration the fact that the assessee has not challenged either the finding of the Income-tax Officer that part of the firm's profits actually escaped assessment or the computation by the Income-tax Officer of those escaped profits, the question of law which appears to me to arise out of the facts is this—"when part of the profits of a registered firm have escaped assessment, can assessment be made under section 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceedings under the said section against the firm itself in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time-barred?" This question is therefore referred.

7. My opinion on this question is as follows:—Under section 3 of the Act tax shall be charged for each year in respect of all income, profits and gains of every individual and every firm. Section 22 (2), moreover, requires an Income-tax Officer to institute proceedings for assessment against any person, other than a company, whose total income is, in his opinion, of such an amount as to render him liable to income-tax. Plainly therefore the Act requires assessment to be made both on a registered firm in respect of the profits made by the firm and also on each partner of the firm in respect of his individual share in those profits. Sub-section (1) of section 16 is also plain to the same effect. Double taxation is provided against by clause (b) of sub-section (2) of section 14, which states that the tax shall not be payable by an assessee in respect of such an amount of the profits of any firm which have been assessed to income-tax as is proportionate to his share in the firm. In the present case the profits in question had not been assessed in the hands of the firm and the provisions of the latter clause were therefore inapplicable. Thus the assessee was personally liable both to assessment and to taxation in respect of the profits in question. It is true that those profits would normally have been computed in the assessment of the firm, but, no assessment of the firm having been made in respect of those profits, the Income-tax Officer utilised the machinery provided in the Act for their computation in the assessment of the partner and there can be no valid objection to his doing so. In my opinion, therefore, the answer to the question is in the affirmative.

Pugh and *Bose*, for the Assessee.

The Advocate-General and *Radha Binode Pal*, for the Crown.

JUDGMENT.

RANKIN C. J.:—The assessee is one Neemchand Daga who has a share of 3 annas 7 pies in the firm of Dulichand Thanmal which is a registered firm within section 2 (14) of the Income-tax Act.

For the year of assessment 1927-28 the firm was assessed at a certain figure but in order to obviate the necessity of refunds being made under section 48 (2) of the Act tax was charged against the individual partners directly upon their shares in the firm's profits. This is a considerate and convenient course and the partners did not object to it. Early in 1929, the Income-tax authorities having discovered that certain profits of the firm had escaped assessment for the year 1927-28, a notice was issued to each partner under section 34 of the Act within the time limited by that section. For reasons which are explained in the case stated by the Income-tax Commissioner, although a similar notice was issued upon the registered firm, the Income-tax authorities are not now in a position to rely upon this notice. Hence arises the question which has been stated for the opinion of the Court: "When part of the profits of a registered firm have escaped assessment, can assessment be made under section 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceedings under the said section against the firm itself in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time-barred?"

In my opinion the answer is in the affirmative. The Indian practice is to impose income-tax by the Finance Act of each year at certain graduated rates upon individuals and at the maximum rate upon registered firms. Super-tax is not imposed upon registered firms but is imposed under certain conditions upon the individual partner in respect of his total income which includes his share of the firm's profits. The firm and the individual are each

required to render a return of total income (section 22 (2)), and may each be required to produce accounts or documents (section 22 (4)). In some cases these returns have to be made to different Income-tax Officers and in different places of assessment. The object of the Act in treating the firm, in addition to the individual partners, as itself a subject liable to assessment is not to differentiate in respect of the sole owner of a business or other assessee. The method of double assessment is employed in the case of firms as a device in the nature of taxation at the source as distinguished from the method of deduction of tax at the source which is employed to collect tax upon salaries and interest on securities. The object of the double assessment to tax in the case of partners and their firm is not to get it often but to get it early and to make sure of getting it; "the simple and effective expedient of taking the profits where they are found" (as Viscount Cave said in another class of case: *Williams* vs. *Singer* (1)) and at the earliest stage at which they can be found. Hence the provisions of section 48 (2) as to refund of tax over-paid and of section 14 (2) (b) which bears directly on the present case and says that tax shall not be *payable* by an assessee in respect of such an amount of the profits and gains of any firm which have been assessed to income-tax as is proportionate to his share in the firm at the time of such assessment.

To collect the tax effectively, without unnecessary inconvenience to the subject, without inconsistency in result and without unnecessary duplication of work on the part of the Income-tax authorities, it is obvious that the profits of the registered firm should be ascertained as a whole before assessment is made upon the individual partners. But I can find nothing in the Act to say that the firm is to be assessed first, still less that the assessment on the firm is to operate as a sort of estoppel in favour of the individual partners. In clause (b) of section 14 (2) the word is "have" not "has". The language of this clause may be compared with that of clause (a) of the same sub-section and that of the proviso to section 55. It seems to me to be free of any suggestion that the individual is never to be liable to pay on any portion of the profits of the firm. This clause applies to firms which are not registered as well as to those which are registered. While both firm and individuals are liable to the tax by the plain wording of the Finance Act, the clause exempts the individual from *payment* in respect of certain profits as soon as those profits are in the hands of the firm assessed, but it does not exempt him at all in respect of profits which have not been assessed. To be taxed at the source is a liability rather than a right and in any case a partner whose firm had not declared certain profits can hardly be heard to complain that the profits have not been assessed upon the firm, or to require an order of assessment should first be made upon the firm in order that he might get the benefit of clause (b) of section 14 (2). That clause confers a benefit upon the individual partner but only in respect of tax upon certain profits. As tax is chargeable upon the whole of the firm's profits and as the whole of a partner's share in the firm's profits is included in his total income regardless of any stipulation between the partners restricting the amount of profits which any partner may withdraw from the firm or of the amount actually drawn by him, it may be just conceivable that to assess a partner directly upon his share of escaped profits results in some way to his disadvantage. I have no real belief in the existence of such cases, but if they do exist they merely mean that it may be worth a partner's while to see that the firm declares the whole of its profits.

(1) 7 Tax Cas. 387 at p. 411.

When the firm is registered under the Income-tax Act and Rules what rights under the Act accrue from registration and to whom? Do they include a right on the part of the individual partner to require that all the firm's profits shall be assessed upon the firm and that whether they be declared or concealed? It is only upon this footing that he can claim a right that no part of the firm's profits shall be assessed as his taxable income and it seems to me to be a very curious implication to make in this Act. When a firm is registered, the firm, not the individual partners, becomes assessable to income-tax at the maximum rate. The firm and not the partners escapes super-tax. But the partners as individuals get certain rights while the registration stands and the Income-tax authorities cannot dispute the amount of the individual's share as shown in the document which they have accepted for registration. The tax paid by the firm is treated as paid on his account in respect of his share and he gets the right to a refund upon this footing (section 48 (2). He has secured to him by section 24 the right to set off his share of the firm's losses against other items of his individual income—again upon the footing that double assessment is only machinery for collection. In effect by the registration of a firm the partners secure that they cannot in respect of super-tax be *exposed* to double assessment at all and that in respect of income-tax they can only be *exposed* to it on certain definite terms. But it is another thing altogether to treat the Act as giving to the subject a right to double assessment, if assessment is to be made at all.

Whether a notice under section 34 was served upon the firm or not, a notice under that section would have to be served on the partner who is now before us to prevent him escaping payment of super-tax and to collect income-tax on his individual income at the higher rate appropriate to his true income. He is clearly a person liable to pay tax on income of his own which has escaped assessment. What answer has he to the Finance Act of 1927 which imposed these taxes upon him? In my opinion he has none.

The question referred to us should be answered in the affirmative and the assessee must pay the costs of the reference.

GHOSE J.:—I agree.

BUCKLAND J.:—I agree.

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(424) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

Before Sir George Rankin, Kt., Chief Justice, Justice Sir C. C. Ghose, Kt., and Mr. Justice Buckland.

(13th January, 1931).

Messrs Shaw Wallace & Co. .. *Assessees* *

v.

The Commissioner of Income-tax, Bengal. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 3, 4 (3) (vii), 10 & 12—Agency, termination of—Payment of compensation money, assessability—If capital receipt—Exemption as non-business receipt—Chargeability under Sec. 10 or 12.

* (1931) 58 Cal. 1153; 35 C. W. N. 361; A. I. R. (1931) Cal. 676.

The assessees who were acting for some years as agents for two oil companies but under no formal agency agreement had their agencies terminated under an arrangement, receiving a sum of Rs. 15¼ lakhs as compensation for loss of the agencies. On an assessment of this sum less amounts paid by them to their agency staff consequent on the termination of their service agreements,

HELD, that the sum in question was in the nature of a capital receipt and not income, profits or gains within the meaning of the Income-tax Act.

HELD further that the said sum though not profits or gains of any business within the meaning of Sec. 10 of the Act would come within the general language of Sec. 12, not exempt under Sec. 4 (3) (vii) as an ex gratia *payment or a receipt not arising from business.*

Turner Morrison & Co. *vs.* Commissioner of Income-tax, Bengal *3 I. T. C. 214; Explained.*

Chibbit *vs.* Joseph Robinson & Sons, *9 Tax Cas. 48; Applied.*

Case [Reference No. 8 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax Act, Bengal for the opinion of the High Court.

CASE.

In accordance with the provisions of section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922) and on the prayer of the assessee, Messrs. Shaw Wallace and Company, I have the honour to refer to the Hon'ble High Court the questions of law as hereinafter stated arising out of the order of the Assistant Commissioner of Income-tax, Headquarters, Calcutta, in the appeal filed by the assessees against the assessment made on them for the year 1929-30, based on the income of the year ending 31st December, 1928.

The following are the facts of the case: The assessees carry on business in Calcutta as merchants and as Managing Agents and Agents of many companies and firms. They have branches in Bombay, Madras, Karachi and Colombo. They also acted as Distributing Agents in India of the Burma Oil Company and the Anglo-Persian Oil Company for many years.

They became the Agents of the Burma Oil Company in Calcutta in the year 1891 and in its inception this agency was very small. But subsequently the business developed rapidly and the organisation for the distribution of the increased output of the Burma Oil Company's products in and around Calcutta was entirely entrusted to the assessees. In 1901 the assessees opened an office in Bombay for the distribution of the Burma Oil Company's products in the area supplied from that port. In 1906 and 1907 agencies for the Burma Oil Company in Madras and Karachi respectively came into the hands of the assessees, and at various times subsequently the assessees established agencies for the Burma Oil Company at Cocanada, Tuticorin, Cochin and Mormugao. Tanks and Tinning Factories were established at all of these places as well as at Budge Budge near Calcutta. The assessees also in course of time undertook as sole agents the sale of the marketable products of the Anglo-Persian Oil Company in India, and became the sole distributors of the very large quantities of Fuel Oil which the Anglo-Persian Oil Company exported to India. Later on the assessees opened an office in Aden and acted as agents there for the Anglo-Persian Oil Company. So during this period

of development the assessees were the agents of the two oil companies and and were responsible to them for the sale and distribution of their products. During the period that they acted as agents for the oil companies the assessees developed their existing office accommodation in Calcutta, and purchased and established new offices in Bombay and Aden. No formal agreements were ever executed between the oil companies and the assessees under which the latter acted as agents.

The assessees' agency in the case of the Burma Oil Company terminated as from the 1st January, 1928, and that in the case of the Anglo-Persian Oil Company as from the 1st July, 1928, and the whole of the work of the sale and distribution of the products of the oil companies was taken over by a new organisation formed for that purpose known as the Burma-Shell Oil Storage and Distributing Company of India, Limited.

The following are the circumstances which led to the termination of the agencies.

For some time prior to the year 1925 there had been negotiations going on between the Soviet Government of Russia and the Standard Oil Company of New York relative to the purchase of the products of Russian Oil Wells which were confiscated by the Russian Government. In 1927 it was discovered that certain large American oil interests had been negotiating with the Russian Government on the basis of obtaining control of exports of Russian oil in consideration of a loan to the Russian Government and had actually entered into contract for the supply of large quantities of oil for sale in Eastern markets. As the intention of the purchasers of the oil in question was that the bulk of the oils were to be shipped to the East for sale, the Burma Oil Company and Anglo-Persian Oil Company were forced to interest themselves in the matter and in order to check the import of Russian oil to the East the Burma Oil Company and the Anglo-Persian Oil Company were forced to combine and form a new marketing company styled the Burma-Shell Oil Storage and Distributing Company, Limited. The formation of this new Company naturally involved the termination of the existing agencies of the assessees. The whole of the negotiations with regard to taking over the business organisation on the transfer of the agency business to the Burma-Shell Oil Storage and Distributing Company, Limited, were conducted verbally in London between the partners there and the representatives of the oil companies concerned.

On the termination of the agencies, the assessees were paid a sum of Rs. 15,25,000 by the aforesaid two oil companies sometime in 1928. Out of this sum, the assessees claimed, at the time of assessment, a deduction of Rs. 5,41,639 being the amount due to the employees of the oil agency business as compensation for the termination of their employment with the assessees. This was allowed by the Income-tax Officer as a business deduction. The balance of Rs. 9,83,361 was considered to be the income of the assessees arising from their business as agents for the oil companies and was included in the total income found assessable for the year 1929-30.

Objecting to the assessment the assessees filed an appeal before the Assistant Commissioner of Income-tax, Headquarters Calcutta, on the following grounds:

(1) The amount in question is not profits or gains to which the Indian Income-tax Act applies and is accordingly not liable to taxation under the Act at all for the reasons (*a*) that it is

not the profits or gains of any business carried on by the assessees within the meaning of section 10 of the Indian Income-tax Act, nor (*b*) is the said sum, income profits or gains from other sources within the meaning of section 12 of the Indian Income-tax Act.

(2) In the alternative the said sum is an *ex gratia* payment in the nature of a present from the oil companies in question and as such is exempted from taxation by the provisions of section 4, sub-section 3 (vii) of the Income-tax Act, as being a receipt of a casual and non-recurring nature, not being a receipt arising from business or the exercise of a profession, business or vocation nor by way of addition to the remuneration of an employee.

The Assistant Commissioner found against the appellants and upheld the assessment.

Being dissatisfied with the Assistant Commissioner's order, they petitioned me to revise the assessment under section 33 or in the alternative to make a reference to the Hon'ble High Court on certain points of law. The letter dated the 21st January, 1930, meant to be a petition under section 66 (2) of the Act was supplemented by a letter dated the 5th February, 1930, in which the points of law raised in the previous letter were set out in somewhat greater detail. Taking these two letters together the points of law raised can be stated as below:—

(*a*) Was not the sum of Rs. 9,83,361 which had been included in the total income of the assessees for purposes of assessment for 1929-30, in the nature of a capital receipt and therefore not income, profits or gains within the meaning of the Income-tax Act?

(*b*) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed under either of the sections 10 and 12 of the Act, inasmuch as (1) it was not the profits, or gains of any business carried on by the assessees within the meaning of section 10 of the Act nor (2) income, profits or gains from other sources within the meaning of section 12 of the Act?

(*c*) In the alternative, was not the payment of Rs. 9,83,361 an *ex-gratia* payment in the nature of a present from the oil companies in question and was it not therefore exempt under section 4 (3) (*vii*) of the Act?

I have declined to interfere on revision under section 33 of the Act and accordingly refer the questions with my opinion on each *seriatim*.

Question (*a*).—It is difficult to see how the receipt in question can be described as a capital receipt as it was not paid in consideration for anything in the nature of a capital asset. Admittedly the assessees had little in the shape of capital assets of their own, so far as their oil agency business was concerned. The storage tanks, tank steamers, tinning factories and other assets for storage and distribution of oil belonged to the oil companies for whom the assessees acted as agents and not to the assessees. The only assets they themselves had appear to have been the office premises at certain centres. Of those only the Aden premises were used entirely for oil purposes, and these were bought outright from them by the Anglo-Persian Oil

Company for the sum of Rs. 204,250 when the agency terminated (*vide* Anglo-Persian Oil Company's letter dated the 9th August 1928). Other office premises owned by the assessees were in use for other purposes besides that of the Oil agency and there was apparently no question of taking them over. But the Burma Oil Company paid the assessees Rs. 2,00,000 as compensation in respect of the Bombay premises, which on cessation of the agency became too large for the assessees' ordinary business (*vide* Burma Oil Company's letter, dated the 4th April, 1928). These sums were not included in the 15 lakhs 25 thousands received by the assessees from the oil companies of which the Rs. 9,83,361 is the balance after allowing certain sums paid as compensation to employees, but were paid separately and have not been included in the assessees' total income for purposes of the assessment in question. It would therefore appear that anything in the nature of material assets taken over from the assessees was paid for separately and was not included in the sum with which we are concerned.

It has been argued before me that the assessees obtained the sum of Rs. 15,25,000 in lieu of something in the nature of 'goodwill'. It is however admitted that there was no actual 'goodwill' in the case. It was never the case of the assessees that they had any 'goodwill' in this agency or that they sold the 'goodwill' to the oil companies. What they say is that the oil companies agreed to pay them this sum so that they should not be dissatisfied and withold their co-operation in the new arrangement or offer their services to rival oil companies. It is not even the case of the assessees that by receiving this payment they are legally debarred from offering their services to the rival oil companies. The payment was simply to compensate the assessees for the loss of business and in my opinion it is irrelevant to enquire what was the motive which prompted the oil companies to meet this demand for compensation so readily.

My conclusion therefore is that the receipt was not a capital one.

As regards question (*b*) the assessees' contention that the receipt is not profits or gains within the meaning of either of the sections 10 and 12 is open to question as the agency cannot be said to have finally terminated till the payment was made. Moreover the wording of Messrs. Finlay Fleming and Company's letter, dated the 2nd February 1928 and of the letter, dated the 8th August 1928 from the Anglo-Persian Oil Company, Limited (relevant portions quoted below) would support a contrary view.

Letter dated the 2nd February 1928 from Messrs. Finlay Fleming and Company, Rangoon to Messrs. Shaw Wallace and Company, Calcutta.—

> "We now advise you that it has been agreed with your principals in London that in lieu of commission for 1928 in terms of your Burma Oil Company Oil Agency, you will receive as full compensation for cessation of the agency a fixed sum of Rs. 12 lacs."

Letter dated the 8th August, 1928 from the Anglo-Persian Oil Company, Limited to Messrs. Shaw Wallace and Company, Calcutta.

> "My Board have instructed me to send you the enclosed cheque for Rs. 3,25,000 as compensation for the loss of your office as Agents to the Company."

In any case the money being admittedly received from the oil companies as compensation for cessation of assessees' agency business is clearly

a receipt arising from business. And so it is assessable either under section 10 or under section 12 of the Act.

Question (c).—I have already found that the receipt was a receipt arising from business and I am not satisfied that the payment is an '*ex gratia* payment.' The payment was admittedly made by the oil companies and received by the assessees as compensation for loss of assessees' agency. Such a payment can hardly be said to be an '*ex gratia* payment' or a personal gift to a friend. Section 4 (3) (*vii*) of the Income-tax Act cannot therefore help the assessees.

In conclusion I may be permitted to submit that the case appears to be on all fours with the case of *Messrs. Turner Morrison & Co.*, v. *The Commissioner of Income-tax, Bengal* (1) which came up before the Hon'ble High Court a short time ago, when the Hon'ble Judges were pleased to decide against the assessees.

Pugh, Page and *Choudhury*, for the Assessees.

The Advocate General and *Radha Binode Pal*, for the Crown.

JUDGMENT.

RANKIN, C. J.:—The assessees Messrs. Shaw Wallace & Co., are a registered firm carrying on business in Calcutta and elsewhere as merchants and managing agents. The year of assessment with which we are concerned is the year 1929-30 and the "previous year" is the year ending 1st December 1928. In addition to their other business the assessees had for many years acted as distributing agents in India for the Burmah Oil Company and also for some years as sole agents in India and Aden for the marketable products of the Anglo-Persian Oil Company. In 1928 these two agencies were determined, and a new company called the Burmah-Shell Oil Storage and Distributing Company of India Limited became agents for the sale and distribution of the products of the Burmah Oil Company and the Anglo-Persian Oil Company. These assessees had at no time had any formal agency agreement with either of these oil companies. The negotiations for the "transfer" of the agencies to the new company were conducted verbally in London between certain partners of the assessees' firm and representatives of the two oil companies. It does not appear that the assessees owned any plant or stock which had to be taken over by their principals but their office premises at Aden and at Bombay were the subject of an arrangement which does not enter into the case now before us. The agency of the Burmah Oil Company terminated as at 31st December 1927 and that of the Anglo-Persian Oil Company as from 30th June 1928.

The Commissioner of Income-tax in stating the case for the opinion of this Court has annexed and referred to certain letters of which two are important. The first is dated 2nd February 1928 and is written by the managing agents in Rangoon of the Burmah Oil Company to the assessees in Calcutta. "In accordance with cabled information received from our London Office, we now advise you that it has been agreed with your Principals in London that in lieu of commission for 1928 in terms of your Burmah Oil Company oil agency, you will receive as full compensation for cessation of the Agency a fixed sum of Rs. 12 lacs. Whether this will be payable

(1) 3 I. T. C. 214

in equal monthly or in half yearly instalments has yet to be advised us. Your Account Sales should therefore be rendered for all spheres as from January 1st, 1928 without deduction of commission, and we shall arrange later on receipt of further advices to make payments against the 12 lacs above referred to.

"As from 1st January 1928 and until the New Company is established and assumes responsibility for its own staff, you will be in order in debiting the Burmah-Shell Company with salaries and wages of those of your Oil Department whom it has been agreed to take over, provided of course that they have been meantime employed on Burmah-Shell Company work. This also applies to any other charges necessarily incurred in the meantime such as the proportion of Office Rent.

"*Delcredere* and other liabilities in connection with the oil agency outstanding as at 31st December 1927 will be on your account".

The second is written from London by the Anglo-Persian Oil Company to the assessees in Calcutta. "In view of other arrangements which have been made my Board have instructed me to send you the enclosed cheque for Rs. 3,25,000 as compensation for the loss of your office as Agents to the Company".

In the case stated it is not suggested that these letters fail to represent the real bargain or arrangement concluded between the parties. The finding of the Commissioner of Income-tax is that the payment in each case was "simply to compensate the assessees for the loss of business" "compensation for loss of assessees' agency". The sum paid by the Burma Shell Company was Rs. 12 lacs and that paid by the Anglo-Persian Oil Company was Rs. 3,25,000. It now appears that upon the cessation of the agencies the assessees had to terminate the service agreements of certain of their staff who were employed in the business of these agencies, and this alone involved the assessees in an expenditure which has been allowed at Rs. 5,41,639, and has been deducted from the sum of Rs. 15,25,000 leaving a balance of Rs. 9,83,361 which has been held by the Income-tax authorities to be liable to tax.

In the case of the Burma Oil Company's agency it is clear from the letter of 2nd February 1928 that certain work had been done by the assessees since the 1st January 1928 and was still to be done and that the sum of Rs. 12 lacs was to exclude any further claim for remuneration for this work, salaries and wages and other charges being debited as from the 1st January 1928 to the principals' account. As regards the Anglo-Persian Oil Company's agency, if this terminated at the end of June 1928, it would appear from the circumstances that the assessees had at least six month's notice of the intention to determine it; but this is not expressly found as a fact in the case stated.

The questions which have been referred to us are three:—

(*a*) Was not the sum of Rs. 9,83,361 which had been included in the total income of the assessees for purposes of assessment for 1929-30 in the nature of a capital receipt and therefore not income, profits or gains within the meaning of the Income-tax Act?

(*b*) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed

under either of the sections 10 and 12 of the Act, inasmuch as (1) it was not the profits, or gains of any business carried on by the assessees within the meaning of section 10 of the Act, nor (2) income, profits or gains from other sources within the meaning of section 12 of the Act?

(c) In the alternative, was not the payment of Rs. 9,83,361 an *ex gratia* payment in the nature of a present from the oil companies in question and was it not therefore exempt under section 4 (3) (vii) of the Act?

The Commissioner of Income-tax has negatived all these contentions of the assessees.

It appears to me that if the assessees cannot escape by reason of the contention raised in question (a) the other two questions present little chance of escape. If the sums in question or either of them are "income, profits and gains of the previous year", within the meaning of the charging section of the Act (section 3) it seems to me to be reasonably clear that it cannot be said that they are "receipts not arising from business" within the meaning of clause vii of sub-section 3 of section 4 of the Act. Accordingly even if it could be made out that they were not profits or gains "of any business" so as to be caught by section 10 the general language of section 12 would catch them.

The real question in the case seems to me to be the first, whether these sums are income, profits or gains within the meaning of the Act at all. The other questions were dealt with by this Court in the case of *Turner Morrison and Company* v. *Commissioner of Income-tax, Bengal*(1) and I have nothing to add to what was then said upon these points. The first question however, as is conceded by the Advocate-General, was not in that case presented to the Court or decided. I have referred to the papers in that case and find that in the statement of facts submitted by the assessees' attorneys to the Commissioner in that case it was said the assessees having a controlling interest in the Company were in a position to present themselves with a gift by way of testimonial irrespective of the fact whether any past relationship existed or not. It was also contended that the assessees had no claim for damages or compensation of any description and that the precise form of the Company's resolution was immaterial. The Commissioner of Income-tax found that the assessees had a claim for remuneration for the year 1924-25 and that the sum in question represented the remuneration for 1924-25 to which the assessees were legally entitled and which if the Company had not been wound up would beyond doubt have been assessed as income. It should be here explained also that the assessees in that case had a three-fifths interest in the capital of the company which was in liquidation and that as to three-fifths of the sum in question the transfer or payment was in the circumstances purely nominal. The sole question referred to the Court as a question of law was in the following terms: "On the above facts, is the said sum of Rs. 2,25,000 received by the assessees exempt from taxation under section 4 (3) (vii) of the Income-tax Act (XI of 1922)?" The contention of the assessees throughout that case was not that the receipt was a capital receipt but that it had no connection with business at all, being a voluntary gift or testimonial, and as such not income, profits or gains under section 10 and saved from both section 10 and

(1) 3 I. T. C. 214

section 12 by the seventh clause of section 4 (3). The case for these reasons is of no authority whatever upon the first of the three questions which we have now to deal with, and having that question now in mind the concluding sentences of my judgment in that case appear to me to exhibit some confusion.

We are only concerned with the legal rights of the parties in so far as they assist us to appreciate the nature or character of the receipt upon which tax is claimed. If the parties make an amicable arrangement according to their own notions of what is fair or their own view of their legal rights, we are concerned merely to appreciate what their bargain or settlement was. If the principal really means to compensate the selling agent for a sudden 'dismissal' or more properly a sudden determination of the agency it is only in very exceptional circumstances that anything is to be gained by considering whether the agent would have enforced a claim for damages and whether he could thereby have obtained the same amount. I see nothing in the facts of the present case to suggest that the large sums now in question were handed over to the assessees upon the footing that there was no real liability. The principals may have been generous and wisely generous in dealing with their obligations but talk of "*ex gratia* payment" is singularly unimpressive in this case. I should be very much astonished to be told—and I should in any case require from the Commissioner a clear finding based upon proper evidence before I would accept it,—that the agency of the assessees with their establishments all over India and elsewhere could be revoked suddenly without the principals becoming liable to indemnify their agents in respect of any obligations incurred by them in connection with the discharge of the agency.

Assuming that in English law there is no general doctrine that agents are entitled to notice before the agency is terminated by the principal, yet this rule is subject to exceptions arising from the particular circumstances of the case; and in India the matter has been dealt with by the Indian Contract Act. Section 206 lays down "Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other". If the phrase "such revocation or renunciation" is to be taken as referring back to section 205 I confess that I find no meaning in the section; and it is at least arguable that what the draftsman meant to say is that when there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency etc. The question of damages and the question of indemnity doubtless would overlap in the circumstances of these agencies, and in the case of the Burma Oil Company we know that the sum of Rs. 12 lacs was in a sense to cover work done and to be done by the assessees until the new agent could take over completely.

Now the Commissioner in the present case has found that the whole of the two sums here in question were received as compensation for loss of the agencies. In this I think he is right and I do not think the bargain with the Burma Oil Company was a bargain that the assessees would agree to take a year's notice from 1st January 1928 and to accept as commission for that year the sum of Rs. 12 lacs. Their former agency was to terminate on 31st December 1927. They were willing to make no claim for what they had done since that date and to do certain further work to facilitate the transfer of the agency—not at their own expense to be recouped with profit by commission—but at the cost of the principal without further profit to

themselves. They were willing to do this and willing to accept—what would otherwise have been wrongful—viz: the termination of the agency as on 31st December 1927 provided they were compensated by Rs. 12 lacs for their loss of this agency. I do not gather that the principals wrongfully determined either agency and then made terms as to damages; rather it would appear that it was all along intended to purchase the assessees' consent and to proceed by agreement with them. In any case I am of opinion that the Rs. 15¼ lacs were paid as compensation for the loss of the agencies as the Commissioner has found, and on that view I think that tax is not claimable upon any portion of this money.

In *Chibbit* v. *T. Robinson & Sons*(1) Rowlatt, J. said: "If it was a payment in respect of the termination of their employment I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all. I do not know whether it has arisen or been discussed, and perhaps the less I say about it the better, but I should not have thought that either damages for wrongful dismissal or a payment in lieu of notice , at any rate if it was for a longish period—I will not say a payment in lieu of notice, I will say a voluntary payment in respect of breaking an agreement which had some time to run—would be taxable profits. But at any rate it does seem to me that compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the income-tax at all".

Under the Indian Act I think that having regard to the express provision made by clause vii of sub-section 3 of section 4 and to the fact that this case does not in my opinion come within that exemption, the circumstance that the receipt is causal or non-recurring does not ground any claim to resist the tax. But if A has a favourable contract of service for ten years at a salary of £ 500 per annum more than any other employer would give him, and if at the end of the first year he is given as damages for wrongful dismissal a sum which is equal to the purchase price of an annuity of £500 for nine years, that sum in my opinion is not income. It "represents" in a sense what would have been income for nine years, but it is the capitalised value of such income and it may be at once invested to produce a smaller annual income which may continue and suffer income-tax for ever. The case is not in principle different from *The Glenboig Union Fireclay Co., Ltd.* v. *The Commissioners of Inland Revenue*(2) where it was held that compensation paid to a lessee of mineral rights for the abandonment of his right to work the minerals was a capital receipt; and Lord Buckmaster's observation is very pertinent to "wrongful dismissal" cases of all kinds: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test."

No doubt cases like the present where the assessees had no contract for a fixed term of years may present features which render this line of reasoning less convincing. When a clerk is given three months wages "in lieu of notice" he may be given this by virtue of a custom or express contract entitling him to the money as and by way of wages (though he does no work for it) or the reference to wages may be only a measure for the computation of damages which are at large. Such cases raise more than

(1) 9 Tax Cas. 48 at page 61.
(2) 12 Tax Cas. 427.

one difficulty which the facts of the case before us do not present at all. Compensation for loss of these agencies is a receipt in respect of a capital asset in the nature of goodwill. Just as the purchase price of a goodwill may be measured by the average profits for a comparatively short period where the element of goodwill is not a very potent factor in inducing further business, so the measure of the compensation for loss of these agencies is not the test of its character as between capital and income. But in any view I see no facts and no findings of fact upon which it can in this case be held that the compensation was in substance or in form a mere payment in advance of earnings of the assessees over a period so short as to suggest that the receipt was income. The phrase in the letter of 2nd February 1928 "in lieu of commission for 1928" has reference merely to the fact that for 1928 the terms of the old agency were no longer to hold good, because the bargain as to compensation was upon a condition which involved that all expenses in the interim should be charged to the principals although the assessees would facilitate the transfer of the agency by doing certain work without making further profit.

In my opinion the first of the three questions stated to us should be answered in favour of the assessees and they should have their costs of the reference.

GHOSE, J.:—I agree.

BUCKLAND, J.:—I agree.

[In this case leave to appeal to Privy Council has been obtained by the Crown Ed.]

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(425) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Jackson and Mr. Niyogi, Additional Judicial Commissioners.

(15th January, 1931.)

Chunnilal Nathmal .. *Assessee.*

v.

The Commissioner of Income-tax, Central Provinces and Berar .. *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 4 (2)—Moneylending business in British India and outside—Excess credits in favour of foreign branch—Presumption as remittances of foreign profits—Burden of proof.

Where the assessee with headquarters at N in British India and branches at Bombay and Bhikaneer, was lending money under two names C. K. and N. C., the transactions in British India under the name of C. K. not being shown in the British Indian accounts on the plea that they related to money advanced by Bhikaneer shop and on failure of the assessee to produce the Bhikaneer account books called for, the excess credits in the headquarters and Bombay ledgers in the name of C. K. were assessed as remittances of foreign profits under Sec. 4 (2) of the Income-tax Act.

HELD, that in the absence of proof to the contrary by the assessee, remittances received in British India from a foreign branch could be presumed to be profits and that on the facts of the case as the assessee did not discharge the burden of proof rightly laid on him, the assessment was legal.

Case [Miscellaneous Judicial Case No. 39-B of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Central Provinces and Berar for the opinion of the Court.

CASE

Chunnilal Nathmal of Nandura in the Buldana District (hereafter called the assessee) is the managing head of a Hindu undivided family. His principal place of business is at Nandura and he has two branch shops one at Bombay and the other at Bikanir in an Indian State. He has business in money lending and cloth dealing and also has a ginning factory. He is also in receipt of income from house property. He does business in partnership also. Big amounts of money are lent out by him either on interest or discount commission. These advances are made in two names, i.e., (1) Chunnilal Kothari and (2) Nathmal Chunnilal. Previous assessment records show that he had been advancing money in the name of Hemraj Nawagaja also (Hemraj Nawagaja being the name of the son of Kisan Narayandas of Nandura who is a partner of the assessee in grain business). Interest received in the name of Nathmal Chunnilal is shown in the books of Nandura and Bombay; but interest received in the name of Chunnilal Kothari or Hemraj Nawagaja is not shown in any of these books on the plea that such interest receipts relate to money advanced by the Bikanir shop, even though such interest is received from debtors residing in British India. As accounts of the Bikanir shop were not produced in the past, the Income-tax Officer estimated the income for the past two years from interest received in the name of Chunnilal Kothari and Hemraj Nawagaja and not accounted for in the books of Nandura or Bombay at Rs. 13,000 and no objection was taken to these estimates.

2. For assessment during the year 1926-27 the assessee returned a loss of Rs. 22,264. This return was made on the 21st of September 1927. It was not accepted as correct; for, in the previous year the assessee was assessed on a total income of Rs. 41,966. The assessee was therefore called on to produce his account books. In the books of accounts at Bombay it was found that there was a Khata (ledger) in the name of "Chunnilal Kothari, Bikanir" which showed an excess of Rs. 56,208 on the credit side leaving out of account the old balances, "havalas", interest and rent of buildings, etc. Similarly it was found that in the Nandura shop books too there was an excess of Rs. 4,903 on the credit side in the Bikanir account. The Income-tax Officer, therefore, asked the assessee to produce the Bikanir accounts as regards these two items or to show cause why these two items should be not added as income received in British India. The assessee was given a lot of time to produce those books of account but he failed to do so. On the 13th of January 1928 he stated: "I have not produced the Bikanir shop accounts to-day as regards the items of Rs. 56,208 and 4,903. I have only to say that no income was brought into British India from Bikanir. I have no further evidence to adduce in support of my contention." As the assessee again appeared on the 3rd of February 1928, he was given time again to produce the Bikanir accounts and he stated: "I am unable to produce the Bikanir accounts even if one month's extension

is allowed. In fact I have no desire to produce Bikanir shop accounts as the shop is not in British India." As these accounts were not produced and as it was held that the compliance with notice under section 22 (4) was not made by the assessee, the Income-tax Officer made the assessment under section 23 (4) basing his assessment on the books as produced before him. The taxable income was calculated as follows:—

Nandura shop...		... Rs.	6,378	6	9	including Rs.4,903 of the Bikanir khata and Rs. 2,368—12—6 as excess credits representing the unappropriated interest in the Nathu Ganpet and Abdul Nabi accounts.
Bombay shop		... ,,	74,304	12	0	including Rs. 56,070 of the Bikanir Khata
	Total Rs.		80,683	2	9	
	Bad debts disallowed ,,		3,301	0	0	
Other items added :—						
Interest received in the name of Chunnilal Kothari from Radhakis Jaikisan of Khandwa and not accounted for in any book...	3,656	0	0			
Discount do. ...	889	0	0			
Interest do. ... from Jasrup Baijnath of Khandwa and not accounted for in any book ...	3,798	0	0			
Interest do. ...	1,998	0	0			
	Rs.	10,341	0	0		
Estimated receipt of Interest from British India not accounted for in books.		,,	12,000	0	0	When the Income-tax Officer found that interest to the extent of Rs. 10,341, information about which was supplied to him by the Income tax Officer of Khandwa remained unaccounted for in the assessee's books although the receipt was admitted by him, the Income-tax Officer,

thinking that other interest might also have remained unaccounted for, estimated the remaining interest at Rs. 12,000 though in the past, as stated above, it was estimated at about Rs. 13,000 each year.

Total Rs				1,06,325	2	9	
Less							
Depreciation * allowed.	4,932	1	3				* Depreciation to this extent only was allowed and the remainder of the depreciation amounting to Rs. 3,817—14—9 has been ordered to be carried forward under the provisions of section 10 (2) (vi), proviso (*b*), as the leasing of a ginning factory is considered as a separate business from money lending.
Interest disallowed in firm's case ...	1,046	11	3				
			Rs.	5,978	12	6	
Total business income ...			,,	1,00,346	6	3	
House property Net ...			,,	5,447	0	0	
			,,	1,05,793	6	3	
Income from partnership ...			,,	12,750	0	0	
			Total Rs.	1,18,543	6	3	

3. As the assessment was made under section 23 (4) an application under section 27 was made on the 13th March 1928 requesting that the assessment under section 23 (4) be set aside; but it was rejected on the 30th March 1928. Thereafter an appeal was preferred on the 30th April 1928 and under his order dated the 21st May 1928 the Assistant Commissioner, taking an erroneous view of the law on the subject, set aside the assessment. The Income-tax Officer re-heard the assessee and passed an order under section 23 (3) on the 23rd of March 1929. The result of this was that the assessment was made on the same amount of Rs. 1,18,543. Against this assessment an appeal was filed and on the 1st May 1929 reduction was allowed as regards the following items:—

Rs. 4,903 In Nandura shop—to be taken into account in the following year.

Rs. 3,301 Bad debts allowed.

Rs. 1,200 Further allowed for shop expenses.

The assessment thus stood on Rs. 1,09,139.

4. An application under section 66 (2) is now made and the following questions are asked to be referred to the High Court:

(1) Is the assessment of income-tax on the sum of Rs. 56,370 legal in the circumstances of the case, especially in view of the fact that there is no legal proof for the conclusion that it is receipt of interest on advances made from Bikanir shop?

(2) Is not the finding illegal as it is the outcome of the burden of proof being wrongly placed on the assessee?

(3) Can not depreciation in the value of machinery be set off as a loss against profits under other heads of income under section 24 of the Income-tax Act?

(4) Is the assessee liable to be assessed on the sum of Rs. 12,000 as there is no legal basis whatsoever for the conclusion that the assessee received that income during the assessment year, it being admitted that there is only reasonable probability that the income may have been received, not certainty that it was so received?

(5) Is the assessment of tax on Rs. 2,368 legal inasmuch as the sum represented fictitious consideration for sale and not income as explained by the assessee?

5. *OPINION. Question No. (1).* From what has been said above, it is clear that the assessee was given ample time to prove that the excess amounts appearing in the name of the Bikanir Khata in the Bombay accounts was not interest or profit brought into British India; but was capital. He first refused to produce the Bikanir books of accounts and towards the end produced only a Bahi which begins from Chait Sudi 15, Samvat 1979 and ends on Palgun Badi 13, Samvat 1984. It contains no ledger accounts and had no corresponding accounts of Bombay or Nandura in it and therefore could not be held to prove that the excess accounts were capital. On the 3rd January 1929 the assessee stated: "Really the fact is that the Bikanir shop has no business and all money is advanced by me from my private purse to persons of stable business. I collect the advances in British India and earn interest on such advances in British India. These advances or income therefrom is not shown in the account books of Nandura or Bombay shops because shops at those places have no concern with that money. Such sums are my private property. I have not kept any accounts for such advances, nor can I show or prove how much income is earned on such investments." From the evidence so produced it is clear that the assessee has failed to prove that the excess in the accounts of Nandura and Bombay shops standing in the name of the Bikanir Khata is capital. The burden of proof that they were capital lay on him. The presumption is that such remittances have been made out of the profits *A. V. P. M. R. M. Murugappa Chettiar*, v. *The Commissioner of Income-tax Madras*[1] and *A. S. P. L. V. R. Ramaswami Chettiar*, v. *The Commissioner of Income-tax, Madras*[2] I am, therefore, of opinion that the assessment of Rs. 56,370 was correct.

(1) 2 I. T. C. 139 (2) 3 I. T. C. 425

Question No. (2). For reasons given above, the burden of proof was correctly placed on the assessee and the Income-tax officer's finding on this point was not incorrect.

Question No. (3). The same question is already before the Court in *Ballarpur Collieries* v. *The Commissioner of Income-tax, C. P.* (3) Section 24 of the Income-tax Act deals with the set off of losses in computing the aggregate income. Depreciation is not an actual loss but reflects a decrease in the assets of the business which the Income-tax Act allows to be set off in a particular way against profits as laid down in section 10 (2) (vi), proviso (b). The provision in this section contemplates the computation of profits with reference to each business separately and with regard to the various provisions of that section and the lumping together of the net profit so arrived at in respect of each separate business. This seems further suggested by the use of the expressions "in business" in section 10 (1) and "such business" in section 10 (2) (v) and (vi) etc. The principle of *Expressio unium est exclusio alterius* also suggests that in the face of a definite provision in law to cover cases in which there are not sufficient profits to allow for depreciation, the other alternative method of adjusting depreciation by set off against other profits cannot be adopted. The Income-tax Act too does not authorise an unrestricted right to set off losses, *vide* proviso to section 9 which does not contemplate losses under property being set off against other profits and also section 8 under which no deduction can be made from interest on securities. I am, therefore, of opinion that this question be answered in the negative.

Question No. (4). The assessee himself admitted that he received interest or discount commission totalling to Rs. 10,341 from Jasrup Baijnath and others as shown above and it is also found that this amount is not accounted for in any of the account books of Nandura and Bombay produced. Therefore when the assessee concealed a total income of Rs. 10,341 to the knowledge of the Department, it is not much to say that his other concealments came to Rs. 12,000. There is, on the facts of the case stated above, enough of legal basis for coming to this conclusion. Moreover, the estimate of income from interest not accounted for is a question of fact, *vide* remarks in paragraph 4 of the judgment passed by this High Court in *Dr. Sir Hari Sing Gour* vs. *The Commissioner of Income-tax, C. P.* (1) This question is therefore not referred to the High Court. I may, for the information of the Hon'ble Judges of the High Court, add that in this case there has been no arbitrary estimate of the income concealed. In *Baijnath* vs. *The Commissioner of Income-tax, Punjab* (2) it was held that should the Income-tax Officer however find on good evidence that even one substantial item is missing he would be entitled to treat the whole account as unreliable. In this case, the accounts were said to be non-existent and not one but as many as four items of receipts were found unaccounted for. Thus the Income-tax Officer had to make his own estimate of the concealed income. In *Dhunichand Dani Ram* v. *The Commissioner of Income-tax, Punjab*(4) it was held that the Income-tax Officer must have some basis for his estimate. In the present case this principle too has been observed for, in the past Rs. 13,000 have been added for such concealments and in this year's assessment the concealments detected amounted to Rs. 10,341. Taking this into consideration, the estimate of Rs. 12,000 for concealed items must be taken to be erring on the side of

(1) 3 I. T. C. 350
(2) 2 I. T. C. 176
(3) 4 I. T. C. 255
(4) 2 I. T. C. 188

leniency. I think, therefore, that the assessee has been leniently dealt with in this respect.

Question No. (5). This item has been allowed in revision.

G. R. Deo, for the Assessee.

D. N. Choudhary, for the Crown.

JUDGMENT.

This is a reference under section 66 (2) of the Indian Income-tax Act, 1922. Out of the five questions referred, question No. 3 has been conceded on behalf of the Commissioner of Income-tax. The questions Nos. 4 and 5 form the subject-matter of another case. The only questions argued were (1) is the assessment of the income-tax on the sum of Rs. 56,370 legal in the circumstances of this case, especially in view of the fact that there is no legal proof for the conclusion that it is receipt of interest on advances made from Bikaner shop? and (2) is not the finding illegal as it is the outcome of the burden of proof being wrongly placed on the assessee? In the assessment year from 1927-28 a sum of Rs. 56,208 was found as excess credit in the books of account at Bombay. The assessee contended that the amount represented capital receipts and not profits. This sum was received in British India from Bikaner. It is contended that the burden of proving that the sum represented capital receipts was wrongly laid on the assessee. This point of law was fully discussed in *Jasrup Baijnath Seth* vs. *Commissioner of Income-tax, C. P.* (1) by this Court. It was held that the remittance received at the head-quarters of a firm in British India from a branch situated in foreign country is presumed to be profits and not capital, and is assessable to income-tax as profits unless the assessee proves the contrary. We therefore hold that the burden of proof was rightly laid on the assessee.

2. It is contended by the assessee that the Commissioner of Income-tax ought to have examined the accounts filed to find whether the sum, whole or part, represented receipts of capital or profits. The assessee Chunnilal himself stated on 3-1-29 that the Bikaner shop had no business and all money was advanced by him from his private purse. He admitted that he collected the advance in British India. He did not keep any accounts of such advances as the money lending carried on by him was purely private. He no doubt produced a Bahi of Bikaner shop which showed some cash book entries. He was asked to produce his account books and was given sufficient time for the purpose. On 3-1-29 his agent Sonaji stated his master had no account books. He desired the Income-tax authorities to make enquiries regarding the hundis received from Saotram Ramprasad of Akola. In view of the assessee's statement and conduct it was exclusively within the jurisdiction of the Commissioner to determine the genuineness of the account books of Bikaner shop produced before him. No offer was made by the assessee to explain the accounts in a way as to show that the money received did not represent profits. The question is really one of pure fact and no useful purpose would be served by entering into further detail.

3. We therefore agree with the answers given by the Commissioner of Income-tax in his statement of the case. The assessee will pay the costs of the Commissioner. Pleader's fees are fixed at Rs. 100.

(1) 5 I. T. C. 90

(426) IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir William Beaumont, Kt., Chief Justice and Mr. Justice Murphy.

(30th January, 1931).

Major K. O. Goldie, C. I. E. M. V. O. *Assessee* *

vs.

The Commissioner of Income-tax, Bombay *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 48—Non-resident shareholder—United Kingdom Sterling companies assessed to Indian Income-tax—Dividends paid outside British India—Share-holder's assessable total income—Refund of Indian Income-tax, when claimable.

Dividends received by a non-resident shareholder outside British India from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in Sec. 2 (8) of the Income-tax Act and assessed to income-tax in British India, are not to be taken into account as part of his total income for purposes of assessment to income-tax under the Indian Income-tax Act.

Where such a shareholder is a person having some income in India liable to assessment under the Income-tax Act though being below the minimum it would not be taxed, a refund of Indian Income-tax is admissible under Sec. 48 in respect of the dividends received by him from the said sterling companies.

Obiter, *Per Beaumont C. J.: If the shareholder has no income assessable to tax under the Income-tax Act, Sec. 48 of the Income-tax Act will have no application in such a case, as he has no total income to which the Act applies.*

Case [Civil Reference No. 11 of 1930] stated under Sec. 66 (1) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay, for the opinion of the High Court.

CASE.

Under section 66 (1) of the Indian Income-tax Act, (XI of 1922, India, hereinafter referred to as "the Act") I have the honour to submit herewith *proprio motu* for favour of your Lordships' decision at a very early date certain highly important questions of law arising out of the income-tax assessment and refund claim of Major K. O. Goldie, C. I. E., M. V. O., (hereinafter referred to as 'the assessee") of 18, Charles Street, London, for the financial year ended 31st March 1930. The questions have been categorically stated in para 8 below and involve the interpretation of section 2 (15) of the Act read with section 16 and sections 2 (6), 2 (12), 4 (1), 14 (2) (a), 20, 23 (3), 48 (1) and 55 and 56 of the Act.

* 33 Bom. L. R. 776; A. I. R. (1931) Bom. 420

2. The assessee is now a resident of London and the questions of law which I hereby refer to your Lordships for decision arise also in hundreds of other similar cases of residents of the United Kingdom. Hence the matter is of great importance. Being a non-resident, it will not be possible, I am afraid, for the assessee to represent his case before you. For this reason as also because I am referring the case *proprio motu*, I have discussed at great length the questions for decision from all points of view while giving my opinion in paras 9—16 below so that your Lordships might easily see where the difficulty arises. It will be seen that, on the whole, I am inclined to agree with the assessee but as the matter is not free from doubt and as it affects a very large number of non-residents and considerable amounts of refunds to be paid to them are involved, it has been considered advisable to have an authoritative ruling from the Hon'ble Court.

3. As required by section 66 (1), I give below the Statement of the Case with the questions for decision categorically set out, followed by my own opinion.

4. **Statement of the Case**:—This assessee has income from the following sources:—

Dividends paid in India by Companies registered in British India	Rs. 1,828	(a).
Dividends paid in the United Kingdom by Companies doing business in British India but *registered in London* and having their head offices in London.	Rs. 3,062	(b).
Interest earned in British India.	Rs. 10	(c).
Income accruing, arising and received outside British India.	Rs. 15,654	(d).
Total world income	Rs. 20,554	

Taking both (a) and (b) to be British Indian income taxed at source at 18 pies in the rupee in the hands of the companies concerned, the assessee has himself claimed a net refund of Rs. 175 as the rate of income-tax applicable to him, taking into account his total world income as per section 48 (4) of the Act, is 12 pies in the rupee.

5. In disposing of the case, an assessment has to be levied under section 23 (3) of the Act on item (c) above viz., the income of Rs. 10 on account of interest earned in British India which has not been taxed at all. The Senior Income-tax Officer who is the assessing officer in the case has also to determine how much of the tax deducted at source at the maximum rate on the dividends received by the assessee is to be given to him under the provisions of section 48 (1) of the Act.

6. As regards the question of assessment under sction 23 (3), the Senior Income-tax Officer has, as required by this section, to "assess the *total income* of the assessee and determine the sum payable by him on the basis of such assessment." The assessment thus involves the calculation of the 'total income' of the assessee. Sections 2 (15) and 16 lay down what this "total income" means and how it is to be calculated. As per details in para 4 above, the income of the assessee consists of the items (a), (b), (c) and (d) specified therein. Of these sources, (d) which is income from outside British India is to be ignored in this calculation of 'total income' for

the purposes of section 23 (3) as that income is to be specially taken into account under section 48 (4) of the Act only for the purposes of calculating the rate of refund under section 48 (1), (2) or (3) of the Act to a non-resident. There is no dispute or doubt whatever as regards the treatment of this item or of item (a) which is income from dividends from companies registered here and which must be taken into account in arriving at the "total income" for the purposes of section 23 (3). Section 14 (2) (a) exempts this income [item (a)] from income-tax a second time in the hands of the shareholder concerned but section 16 lays down that it is to be taken into account in calculating the "total income". As regards item (c) too, there is no difficulty. It is to be included in the total income and taxed. The only difficulty that arises is as regards (b). This consists of dividends from sterling companies doing business in British India *and paying Indian income-tax* but registered in London and having their head offices there and paying dividends there. The question is whether this kind of dividend income is to be treated exactly like item (a) i.e., dividends paid here by companies registered here and included in the 'total income' or is to be treated like item (d) i.e., income from outside British India and ignored. If it is to be treated like (a), sections 14 (2) (a) and 16 should apply to it. Including this item, the 'total income' will amount to Rs. 4,900 (Rs. 1,828 plus Rs. 3,062 plus Rs. 10) and income-tax will be leviable on Rs. 10 at 5 pies in the rupee. Ignoring this item, the total income will be Rs. 1,838 only (Rs. 1,828 plus Rs. 10) and as it will be under Rs. 2,000, no tax will be leviable on Rs. 10.

7. As regards the question of refund, since in the case of dividends from companies to which the Act applies, income-tax is paid by the Companies themselves at the maximum rate of tax (viz., 18 pies in the rupee for the purposes of this assessment), the shareholders receiving the dividends are under section 14 (2) (a) exempted from any tax thereon and are moreover under section 48 (1) of the Act allowed to claim a refund if the rate of tax applicable to them is less than the maximum rate. The assessee in this case being a non-resident, for the purpose of ascertaining the rate of refund applicable to him under section 48 (1), we have to take into account his total world income viz., Rs. 20,554 as shown in para 4 above. The rate of tax applicable to him is thus 12 pies in the rupee and so he is entitled to a refund at 6 pies in the rupee (18 pies less 12 pies) on that part of his dividend income to which the Act applies. Hence the further question which arises in the case is whether refund at 6 pies should be allowed on item (a) alone viz., dividends from Companies registered here or also on item (b) viz., Rs. 3,062 received outside British India from sterling companies registered in London but doing business here *and assessed here*. The assessee himself claims that this item (b) is also to be taken into account for assessment and refund purposes. The result of the case will be as under according as this item is taken into account or ignored.

If the item is taken into account.

Tax on Rs. 10 at 5 pies	Rs.	0	4	0
Refund at 6 pies on Rs. 1,828 plus Rs. 3,062 provided the necessary certificates under Sec. 20 are forthcoming	„	152	13	0
Net refund due	„	152	9	0

If the item is ignored.

Tax on Rs. 10 ..	Rs.	0	0	0
Refund on Rs. 1,828 (provided the necessary certificates under Sec. 20 are forthcoming) ..	„	57	2	0
Net refund due ..	„	57	2	0

The question before the Senior Income-tax Officer is thus whether a net refund of Rs. 57-2-0 alone or Rs. 152-9-0 is due to the assessee.

8. Questions for the decision of the High Court:—The questions of law which I request your Lordships to decide may be categorically set out as under:—

(1) Whether in view of the provisions of Sec. 2 (15) read with section 16 and sections 4 (1) and 14 (2) (a) of the Act, in calculating the total income for the purposes of sections 23 (3) and 56 of the Act, dividends received outside British India from sterling companies registered in the United Kingdom but satisfying the definition of a company in section 2 (6) of the Act and assessed to income-tax in British India, are to be taken into account as part of the said total income for the purposes of income-tax and super-tax assessments;

(2) Whether in view of the provisions of sections 4 (1), 14 (2) (a), 20 and 48 (1), a refund of Indian Income-tax is admissible to the share-holders of such companies on account of such dividends received outside British India.

(3) Whether certificates under section 20 of the Act signed by the Principal Officer in the United Kingdom of such companies can be regarded as valid certificates for the purposes of section 48 (1) of the Act and refund granted on their production.

9. Opinion of the Commissioner:—As section 66 (1) of the Act requires me to give my opinion while sending on this reference, I beg to state that the questions raised are closely connected and one view about them might be as under:—

Such a dividend cannot be taken into account in calculating the total income for the purposes of section 23 (3) of the Act as it is an English debt accruing in respect of shares located in England and as the fact that the Company earns its profits (some of which are distributed as dividends) in British India is immaterial. For this reason, the dividend income cannot be said to accrue or arise in British India and as it is also admittedly not received in British India, section 4 (1) of the Act does not apply to it and hence it is outside the scope of the Income-tax Act as this important charging section lays down that the Act applies only to income, profits or gains accruing or arising or received in British India or deemed under it to so accrue or arise or be received. If the Act does not apply, of course no section thereof can apply. Hence the dividend income can neither be taken into account in assessing the total income for the purposes of section 48 (1), nor can any super-tax be levied under section 55 as the "total income" for super-tax purposes is under section 56 of the Act, the "total income" ascertained for income-tax purposes. The above argument is based on the English decision in the case of *London South American Investment Trusts Ltd.* vs. *The British Tobacco Co., Australia Limited* (1) in which it was held that the shares held by the plaintiff company in the defendant company were locally situate in England and that dividend due in respect of them was an English debt.

10. If this view is considered to be the correct view, the answer to questions (1) and (2) will be in the negative and the result will be that in levying income-tax and super-tax, these dividends will have to be excluded from the total income and at the same time no refunds will be allowed to the shareholders of such companies under section 48 (1) of the Act. As

(1) (1927) 1 V. Ch. 105.

regards question (3), the answer will also be in the negative as section 20 cannot apply when the Act itself does not apply to income of this kind. Moreover, it can also be argued that this section can apply only to the principal officer of a company registered in British India and not to the principal officer of a company registered in the United Kingdom because the latter is outside the jurisdiction of the Indian Legislature. Also the Income-tax Officer cannot substitute any other person in India for the principal officer in the United Kingdom in the exercise of his powers under section 2 (12) of the Act, because the duty under section 20 of furnishing a certificate is imposed on the principal officer at the time of distributing the dividends i.e., on the person actually distributing the dividends and since the obligation can only apply to a person within the jurisdiction of the Indian Legislature, it can only apply to a person paying dividends in India. Hence a certificate signed by the principal officer in the United Kingdom cannot be accepted as a valid certificate.

11. Another way of looking at these questions, however, is this. We are concerned only with the interpretation of the Indian Income-tax Act. Hence if the Act requires that these dividends be taken into account in calculating the total income under section 16 of the Act and in granting refunds under section 48 (1) of the Act, we will have to do so. From what is stated above, it will be seen that the view that these dividends are outside the scope of the Act is based on the assumption that under its section 4 (1), the Act applies only to income, profits or gains accruing or arising or received in British India or deemed to so accrue or arise or be received. Section 4 (1), however, runs as under:—"4 (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

The first four words viz., "Save as hereinafter provided" appear to nullify the above assumption as they mean that in spite of the provision that the Act shall apply to all income, profits or gains accruing or arising or received in British India, etc., in case there is any specific provision in the Act after this section 4 (1) which applies to income, profits or gains not so accruing or arising etc., the Act shall as well apply to them. Hence the provisions in this section 4 (1) about income accruing or arising etc., cannot be said to set aside all other provisions in the Act which might require us to take into account certain classes of income. These provisions will have to be therefore duly taken into account notwithstanding what section 4 (1) says about income accruing or arising etc.

12. Let us consider first of all the exact nature of the income under consideration. It is dividend income paid in the United Kingdom by companies registered there and having their head office there but doing business in British India *and paying Indian income-tax*. Under section 2 (6) of the Income-tax Act, a "Company" means a "company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent etc." The companies in the present case are formed in pursuance of an Act of Parliament. Hence they are companies within the meaning and for the purposes of the Act. Turning now to the provisions in the Act referring to special classes of incomes, we have first of all section 14 (2) which lay down that "tax shall not be payable by an assessee in respect of (a) any sum which he receives by way of dividends as a shareholder in a company where the profits or gains of

the company have been assessed to income-tax." In the present case the assessee has received dividends from companies which are companies within the meaning of the Act and which have been assessed to income-tax. Hence whatever section 4 (1) might say as regards the Act applying to income accruing etc., as there is this specific provision about income from dividends, it must apply to this income in the present case as this section 4 (1) distinctly lays down that its provisions are to apply "Save as hereinafter provided." Hence this section 14 (2) (a) can be held to apply to the dividends received by the assessee as it does not say that it is restricted merely to dividends received from companies rgistered in British India. It refers to sums received by way of "dividends as a shareholder in a company" As the Legislature has deliberately included these sterling companies registered in the United Kingdom within the definition of a company in section 2 (6), and as such companies pay their dividends outside British India as a rule, the Legislature would have definitely stated that such dividends were excluded from the benefits of this section 14 (2) (a) if that was its intention. It has not however, put down any such thing. Hence the only possible inference is that dividends received by shareholders of all such companies are covered by section 14 (2) (a) and entitled to an exemption from tax a second time in their hands. The reason why this exemption is granted is evidently to avoid double taxation, the companies concerned having already paid tax on the profits distributed as dividends. When both Indian and sterling companies are made to pay tax here equally without any distinction whatever, would it not have been wholly illogical for the Legislature to exempt dividends paid by Indian Companies only and not sterling companies? The place of residence of the shareholder and the place of payment of a dividend as also the place where the shares in the company concerned were subscribed for appear to be all totally immaterial as far as this Act is concerned as everywhere it merely talks of "shareholders in a company" without any qualification or modification whatsoever because the real reason for the exemption granted and refunds allowed is the payment of tax by the companies concerned and nothing else.

13. The above detailed consideration of section 14 (2) (a) is important as section 16 (1), which lays down how to calculate the total income of an assessee, requires that in doing so, "sums exempted under sub-section (2) of section 14" shall be included. Hence if these dividends fall under section 14 (2) (a), they must be included in computing the total income of the assessee. As this section 16 specially provides for the inclusion of dividends from companies in the total income, we must do so even though the dividends may not be income accruing etc., within the meaning of section 4 (1) as that section itself says that its provisions are subject to the subsequent provisions of the Act.

14. The above sections 14 and 16 occur in Chapter III of the Act headed "Taxable income". After this Chapter, we have Chapter IV headed "Deductions and Assessment". Therein the sections of the Act which require consideration in this connection are sections 20 and 23 (3). Section 20 which forms the subject matter of question (3), requires the principal officer of every company to furnish to every person receiving a dividend, a certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed. In the present case, the assessee has been provided with such certificates by the sterling companies concerned and he has sent them to the Senior Income-tax Officer. I submit

herewith copies of these marked as Exhibits A* and B* as they will enable your Lordships to see the case more clearly. These are both dated from Gresham House, Old Broad Street, London, and are signed in one case by the Secretary of the Company concerned viz. The Rohilkand and Kumaon Railway Co. Ltd., and in the other viz. The Bengal and North Western Railway Co. Ltd., by its Managing Director. The certificates are to be given by the principal officer and as per the definition of a "principal officer" in section 2 (12) of the Act, the person who has signed each of these certificates is a principal officer of the company concerned. Hence the certificates would appear to be valid. The argument adduced in para 10 above that this section can apply only to the principal officer of a company registered in British India and not to the principal officer of a company registered in the United Kingdom because the latter is outside the jurisdiction of the Indian Legislature does not appear to have much force because the Legislature, having definitely included these sterling companies in the definition of a 'company', must have known full well that in cases like these principal officers would be outside British India. Hence if such principal officers were not to be recognised in defining a "principal officer" under section 2 (12) of the Act, they would have been definitely excluded. As this is not done, the inference is that they are to be included. As regards the other argument that section 20 imposes the duty of granting a certificate on the "principal officer at the time of distributing the dividends," a more correct reading of the section appears to be that the principal officer, whoever he may be, is to grant a certificate at the time of distribution of dividends as the section runs "the principal officer of every company shall, at the time of distribution of dividends, furnish etc.," and not "the principal officer of every company at the time of distribution of dividends, shall furnish etc."

15. A detailed consideration of the provisions of section 20 is important and necessary in this case, as under section 48 (1), a shareholder in a company is entitled to a refund only on production of a certificate under this section 20.Hence the above comments on its provisions. Now turning to section 48 (1) itself, like section 14 (2) (a), it too merely refers to "a shareholder in a company" and makes no distinction whatever between a company registered in British India and one registered in the United Kingdom. As repeatedly stated above, the word "company" as used in the Act includes both classes of companies as per section 2 (6). Had the Legislature therefore wanted to make any distinction whatever between the shareholders of a company registered in India and those of a company registered in the United Kingdom it would have most certainly said so specifically. On the provisions of section 48 (1) depend refunds of lakhs of rupees out of tax paid by companies and if the intention was to exclude the shareholders of companies registered outside British India, it would have been stated so in the clearest terms. The obvious intention would appear to be to grant refunds to shareholders of all companies satisfying the definition of a company in section 2 (6) who produce the certificates referred to in section 20, for the simple reason that the companies themselves have paid tax on the profits distributed as dividends.

16. Next comes section 56, which provides that the total income for income-tax purposes shall be taken to be the total income for super-tax purposes. Hence if these sterling dividends are to be taken into account in calculating the total income for income-tax purposes, they will have to

* Not printed.

be taken into account for the purposes of the total income for super-tax purposes too and super-tax levied on the total income thus computed.

17. Taking all the above arguments duly into account, I myself am inclined to consider the second view detailed above as the more correct view and would accordingly answer all the three questions in the affirmative. This is also the view of the assessee in this case and naturally of all the refundees from the United Kingdom as we have received hundreds of such applications for refunds. However, as the first view is also arguable and as a large amount of refund of Government revenue is concerned, I have thought it better to get the matter judicially settled thus.

18. As required by section 66 (5) of the Act, a copy of your Lordships' decision may kindly be sent to me for further action.

Binning instructed by *Little & Co., Solicitors*, for the Assessee.
The Advocate General, with the *Government Solicitor*, for the Crown.

JUDGMENT.

BEAUMONT, C. J.:—This is a reference by the Commissioner of Income-tax under section 66 asking for our opinion on three questions which he states in paragraph 8 of the case.

It appears that the assessee, Major Goldie, is entitled to income derived from 4 sources set out in paragraph 4 of the case. The first is dividends paid in India by companies registered in British India. The second source is dividends paid in the United Kingdom by companies doing business in British India but registered in London and having their head offices in London, and, I understand, also having their share register in London, though that fact is not stated. The third source is interest earned in British India and the fourth source is income accruing, arising and received outside British India.

The questions arise in respect of the second source, i.e., dividends paid in the United Kingdom by companies doing business in British India but registered in London and having their head offices in London. The particular companies from which the income is derived are admitted to be companies within the definition contained in section 2 (6) of the Indian Income-tax Act.

The first question is whether the assessee is liable to be assessed in respect of income derived from those companies, and it appears to me to be quite clear that he is not so liable. The companies themselves have paid income-tax in respect of income which accrues or arises in India, but the dividends which those English companies pay to the assessee, who is resident in England, are simply a debt payable by an English debtor to an English creditor and the source from which the debtor obtains the money with which he pays is irrelevant. It seems to me clear that these dividends are not income which accrues or arises in British India and they are plainly not received in British India. Therefore by virtue of section 4 of the Indian Income-tax Act that income is not liable to assessment.

The second question which arises is as to whether the assessee is entitled to a refund under section 48 of the Indian Income-tax Act. That section is in these terms:—

"48 (1) If a shareholder in a company who has received any dividend therefrom satisfies the Income-tax Officer that the rate of income-tax applicable to the profits or gains of the company at the time of the declaration of such dividend is greater than the rate applicable to his total income of the year in which such dividend was declared, he shall, on production of the certificate received by him under the provisions of section 20, be entitled to a refund on the amount of such dividend (including the amount of the tax thereon) calculated at the difference between those rates."

There is no doubt that the present assessee, Major Goldie, is a shareholder in a company as defined by the Act who has received a dividend therefrom. Therefore, he is a person to whom, *prima facie*, the section applies. He has then got to satisfy the Income-tax Officer that the rate of income-tax applicable to the profits or gains of the company in question at the time of the declaration of such dividend (which was 18 pies) is greater than the rate applicable to his total income of the year.

Now, in order to ascertain what his total income of the year is, one has to look, first of all, at the definition in section 2 (15) of the Indian Income-tax Act, which says:—"total income" means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16"; therefore, he must have a total income to which the Act applies, that is, by virtue of section 4 an income accruing, or arising or received in British India. If he has got such a total income, then it seems to me that he comes within the section. In the case of Major Goldie he has such an income. He is assessable in respect of the first source of income being dividends paid in India by companies registered in British India, although having regard to section 14 (2), if the company has paid the tax, the shareholder will not have to pay it over again. He is also assessable in respect of the third source of income, which is interest earned in British India. Therefore, it seems to me that he is entitled to claim a refund.

In ascertaining the amount of his total income for the purposes of calculating a refund the provisions of section 48 (4) have to be borne in mind. That sub-section does not contain, in my view, a further definition of the total income, but for the purposes of section 48 it adds certain sources of income to the total income defined in section 2 (15) and it provides that total income is to include, in the case of any person not resident in British India, all income, profits and gains wherever arising, accruing, or received, which, if arising, accruing or received in British India, would be included in the computation of total income under section 16. So that for the purpose of ascertaining the total income under section 48, you have to take the total world income, that is, in the case of Major Goldie, all the sums set out in paragraph 4 of the case which I understand to be gross income before any deduction in respect of English or Indian income-tax. As I understand from the case that this total world income would be liable to be assessed at the rate of 12 pies, and as the company has been assessed at the rate of 18 pies, I think that the assessee is entitled to a refund at the rate of 6 pies.

With regard to the actual questions put to us, we are disposed to think that they are too wide to be answered in the actual form in which they are put.

I propose to answer question (1) by saying that dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in section 2 (6) of the Act and assessed to income-tax in British India, are not to be taken into account as part of the total income of the assessee for the purposes of income-tax assessment. No question of super-tax arises, and I do not propose to deal with that.

With regard to question (2), I think the answer should be that the assessee being a person liable to assessment to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from the companies referred to in the answer to question (1).

I think I ought to say, in view of some of the observations of the learned Commissioner appearing in the case, that the question whether the assessee would be entitled to the deduction claimed if he had no income assessable to tax under the Indian Income-tax Act does not arise, but my own view is that in such a case the shareholder has no total income to which the Act applies and therefore section 48 would have no application in such a case.

No order as to costs.

MURPHY, J.:—I would answer the question in the same sense. Major Goldie's income consists of four items. Of these the first was a dividend paid in India by a company registered in British India, and the second a dividend paid in the United Kingdom by a company doing business in British India but registered in London and having its head office in London. The third an item of Rs. 10 interest paid to him in India and the last income accruing wholly outside British India. Two of these are items on which income-tax would ordinarily be assessable in India, and one which is totally exempt from the tax.

The question before us is whether the second kind or (b) income derived from the dividend paid by the company registered in England, but doing business in India, can be included within the definition of 'total' income under section 23 (3). This is a charging section only and refers to 'total' income without defining it. The definition is in section 2 (15) and is as follows:—"Total income" means amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in Sec. 16," and section 16 includes in total income sums actually exempted from the tax under the proviso to sub-section (1) of section 7, provisos to section 8, sub-section 2 of section 14, and sums falling within section 15. Major Goldie's (b) item of income would fall within sub-section 2 of section 14 as having already paid income-tax in the hands of the company. But Major Goldie is not resident in India, and the dividend was paid to him by the head office of the company in England. I think that in those circumstances the Act does not apply to this item, and that it cannot be reckoned as part of his total income under the definition.

But, as pointed out by the learned Chief Justice the questions put to us really turn on whether Major Goldie is or is not entitled under section 14 (2) to a refund of the income-tax already paid on this dividend by the company, being the difference between the rate at which the company has

paid, and the rate at which he would have to pay according to his total income.

Major Goldie has some income in India, which is assessable under the Act, though being below the minimum it would not in his case be taxed, and it seems to me that being an assessee, he is entitled to a refund of Indian income-tax on sums received by him as dividend from the company referred to under item (b) on his income.

I therefore answer the questions put to us as has been done by the Honourable the Chief Justice.

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(427) IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir William Beaumont, Kt., Chief Justice and Mr. Justice Murphy.

(4th February, 1931.)

The National Mutual Life Association of Australasia Limited — *Assessees**

v.

The Commissioner of Income-tax, Bombay . *Referring Officer*

Income-tax Act (XI of 1922)—Income-tax Rules 25 and 35—Mutual Life Assurance Non-resident Company with Branches in British India—Contributions from participating policy-holders, assessability of—Non-submission of return and assessment under Sec. 23 (4)—Computation of assessable income—Rules 25 and 35, applicability of—Reference under Sec. 66 (2)—High Court, Jurisdiction to amend questions.

A Mutual Life Assurance Company limited by guarantee with no share capital and with every participating policyholder deemed a member, is not assessable to income-tax or super-tax in respect of the premium income or any part thereof received from its members under participating policies. The Company is chargeable on its income from investments and on profits from non-participating policies or any other source except contributions from participating policyholders.

Where such a Company not incorporated in British India but with branches in British India did not submit a return under Sec. 22 (1) of the Income-tax Act, the Income-tax Officer in making an assessment under Sec. 23 (4) was justified under Rule 35 of the Income-tax Rules, in the absence of more reliable data, in assuming the profits of the assessment year to be the average annual profits shown in the Company's triennial valuation, Rule 25 not being applicable to a non-resident company.

Where the triennial valuation showed the receipts from sources other than non-taxable premium income of participating policyholders to be larger than the profits shown the[illegible], the profits shown in the triennial account might be taken as representing taxable profits and deducting therefrom the balance of expenses remaining over after the premiums on partici-

(1931) I. L. R. 55 Bom. 637; 33 Bom. L. R. 807; A. I. R. (1931) Bom. 448.

pating policies were wiped out, the balance would be the total income, profits and gains assessable under Rule 35 in the proportion which the Company's Indian premium income bore to the total premium income.

The New York Life Insurance Co., *v.* Styles, 2. Tax Cas., 460; *Applied.*

Under Sec. 66 (2) of the Income-tax Act the High Court has power to amend the questions asked by the Commissioner by raising the real question in the case and then answering that question.

Shiva Prasad Gupta *v.* Commissioner of Income-tax, U. P., 3. I. T. C., 406 *and* Kajorimal Kalyanmal *v.* Commissioner of Income-tax, U. P., 3 I.T.C. 451; *Followed.*

Case [Civil Reference No. 5 of 1928] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act (XI of 1922, India,) (hereinafter referred to as the Act) and at the instance of the National Mutual Life Association of Australasia Ltd., (hereinafter referred to as the Company), I have the honour to refer to your Lordships for favour of opinion the questions of law categorically set out in paragraph 8 below arising out of its income-tax and super-tax assessment for the past financial year 1926-27.

2. **Facts of the Case.** This Company was incorporated under the laws of the State of Victoria in the year 1869 and is limited by guarantee. No capital was subscribed then or at any later time. Certain original members of the Company guaranteed the payment of any claims that might arise during the first year of its existence. Exhibit A* is a copy of its Memorandum and Articles of Association and from its Article III it will be seen that under the guarantee given by each member, his liability as regards the debts and liabilities of the Company is limited to the nominal sum of £ 1 only. The Company has duly filed with the Registrar of Companies, Bombay, the documents prescribed by section 277 (i) of the Indian Companies Act 1913 (Vide please the Certificate of the Registrar of Companies, Exhibit B*). Its head office is at Melbourne and it is doing life insurance business in various parts of the world on a vast scale as will be seen from the copy of the last report of its Actuary for the triennium ended 30th September 1925 submitted herewith (Exhibit C*). In Article II of the Memorandum of Association (Exhibit A) are given "the objects for which the Company is established" in detail and your Lordships' attention is invited to it. From it, it will be seen that the Company is formed to grant assurances to members as well as other persons, to invest money in Government and other securities, to make advances to members and other persons on security of policies issued by the Company, etc. etc. The Articles of Association which accompany the above Memorandum of Association (Exhibit A) lay down that every person who insures his life with the Company under a participating policy is to be deemed a member of the Company. There are no share-holders and all the surplus profit is divided out amongst the members who are, as stated above, persons who take out participating policies.

*Not printed.

3. Article 4 of the Articles of Association (Exhibit A) says that the business of the Company is to be divided into the following branches, viz:— I. The Assurance Branch. II. The Annuity Branch. III. The Endowment Branch. IV. The Deposits and Savings Branch and V. Any other branch as may be determined by a special resolution of the Company.

4. Article 85 (Exhibit A, page 30) as subsequently amended in 1899 lays down that a triennial actuarial valuation shall be made once in every three years by the Actuary of the Company for all its business and the surplus profit thus ascertained is to be distributed amongst the participating policyholders. This Article 85 as originally framed required a separate calculation of profit for each branch of the business of the Company as given in the preceding paragraph. This has, however, now been given up and only a consolidated valuation report is drawn up including all branches of the business.

5. Exhibit C is the last report of the Actuary for the triennium ended 30-9-1925 prepared as per the above Article 85 of the Articles of Association and is the most important document in this case. From its page 12, it will be seen that on the above date, there were 1,59,789 policies on account of assurances with profits and 2,840 policies on account of assurances without profit. Besides, there were 15,100 endowment Policies and 817 annuities. On page 14 are given details of re-assurances which are also taken up by the Company as a part of its business. On page 11 is given the consolidated revenue account of the three years covered by the triennial report. Its credit side shows its various activities which have resulted in its earning surplus profits to the tune of £ 2,569,492-14-11 during the triennium. Besides premia received from its policyholders, it has earned £ 3,254,860-14-7 as interest and £ 1,594,609-3-10 as 'consideration for re-insuring the liabilities of other companies.' Details showing how the above surplus has been arrived at are given on page 4. As this surplus amounts to £ 2,569,492-14-11 only against the interest income of £ 3,254,860-14-7, it will be clear to your Lordships that but for this interest income, there would have been no surplus at all but actually a heavy deficit of £ 685,367-19-8 the rates of premia levied by the Company on account of its participating and non-participating policies being far below the actual amounts required to meet its liabilities.

6. On account of the fact that life insurance companies have to make due provision for liabilities on account of all existing policies when ascertaining their profits, and since the determination of the amount of these liabilities requires very intricate periodical actuarial calculations, the ordinary method of ascertaining profit and loss does not hold good in their case. There is a special method of arriving at their surplus profits and on this account, for income-tax purposes too, a special procedure is laid down for ascertaining the taxable income of such companies. Accordingly, section 59 (2) (a) (ii) of the Act empowers the Central Board of Revenue to frame rules prescribing "the manner in which and the procedure by which, the income, profits and gains" of insurance companies are to be arrived at for assessment purposes. In the case of companies with head offices outside India, there is a further difficulty as profits are not, as a rule, separately calculated for the British Indian branches as in the present case. Hence section 59 (2) (a) (iii) gives similar power to the Board to make rules for ascertaining the taxable income of the Indian branches of such non-resident companies. In virtue of these powers, rules 25 and 35 of the Income-tax Rules have been framed by the Board. For convenience of reference, copies of these rules are appended to this Reference. Rule 25 requires that profits of life insurance

companies be taken at the annual average of the total surplus profits as ascertained at the last periodical actuarial valuation. Rule 35 states that in the absence of more reliable data, the taxable income of Indian branches of non-resident insurance companies may be deemed to be "the proportion of the total income, profits and gains of the companies corresponding to the proportion which their Indian premium income bears to their total premium income."

7. For the financial year 1926-27, the Company was assessed under the above Rules 25 and 35 by the Senior Income-tax Officer as under:—

Surplus profit for 3 years as per the last actuarial valuation (Exhibit B. page 4)	... ...	£ 2,569,492-14-11
Premium income of the whole Company	... ...	£ 7,224,403-14—1
,, ,, ,, British Indian branches ...	...	£ 88,355—0—0
Annual profit $= \frac{88,355 \text{ (British Indian premia)}}{8,224,403 \text{ (Total premia)}} \times \frac{2,569,492}{3}$	...	(Average annual profit)

$=$ £ 9,201$=$Rs. 1,21,415.

8. Against this assessment by the Senior Income-tax Officer, the Company appealed to the Assistant Commissioner of Income-tax, Bombay. A copy of the petition of appeal accompanies (Exhibit E*). Therein it is stated that this Company is a purely mutual Association with no shareholders, that the participating policyholders are alone its members, that a "calculation is made by the Association of the probable death rate among the members and the probable expenses and other liabilities and the amount claimed for premiums from members is commensurate therewith," that "an account is taken annually and the greater part of the surplus of such premiums over expenditure referable to these policies is returned to policyholders as bonus either by additions to the sums assured, or in reduction of future premiums" and that "no part of the premium income received under such participating policies is liable to be assessed to income-tax." The Company further claimed that tax was to be levied only on the amount of "interests derived from the Indian banking account," and "the interest on advances made to policyholders in India" which in all amounted to Rs. 8,232-12-0 as per its calculations. The Assistant Commissioner considered the assessment levied by the Senior Income-tax Officer as in order and confirmed the tax. After the appeal was decided, the Company's Solicitors wrote to me saying that they had instructions to say that its income did not amount to Rs. 8,232-12-0 even as stated in the petition of appeal and under section 66 (2) of the Act, requested me to draw up a Statement of the Case and refer to your Lordships for decision the two questions categorically set out in the following paragraph.

9. **Questions for decision by the High Court.** The questions for decision are as under as stated by Messrs. Craigie, Blunt and Caroe, the Solicitors of the Company:—

(a) Where the premium income received by the Association from its members under participating policies or any part thereof is liable to be assessed to income-tax as profits or gains of a business under section 6 (iv) and section 10 of the Indian Income-tax Act, XI of 1922.

(b) Whether such income or any part thereof is liable to be assessed to income-tax or super-tax as 'income, profits or gains' under any other and if so under which of the provisions of the said Act?"

*Not printed.

10. **Opinion of the Commissioner.** As section 66 (2) of the Act requires me to state my opinion while forwarding this Reference to your Lordships, I beg to state as under.

11. As stated in paragraphs 6 and 7 above, the assessment in this case has been made by the Senior Income-tax Officer under Rules 25 and 35 of the Income-tax Rules which apply to cases of this kind. The premium income as such by itself has not been assessed by him and it cannot be assessed in any case whatsoever as these are mere gross receipts and tax is in all cases levied not on gross but on net receipts. This being life insurance business, the Senior Income-tax Officer has taken the surplus profit as ascertained by the Actuary of the Company as the basis of his assessment and this is a different matter. These questions which the Company wants your Lordships to decide refer only to sections 6 (iv) and 10 of the Act which are general sections applicable to all kinds of business incomes. There is no reference to the above Rules under which the assessment has been specifically made and I respectfully submit it is somewhat difficult to see how such questions can arise in this assessment. The reason for this state of affairs appears to be that the phraseology of these questions has been copied from the Statement of the Case, paragraph 20, in the English case of *Styles* v. *The New York Life Insurance Company*,(1) decided by the House of Lords in the year 1889. The basis of assessment in that case was, however, entirely different, since it was not at all based on the Actuary's valuation report. Only the premium income in the United Kingdom was taken into account (excluding interest income) and after deducting therefrom claims under policies payable in the United Kingdom and the expenses incurred in the United Kingdom, the balance of the premium income was taxed. The question naturally arose there whether the balance of the premium income on account of the participating policies which was thus assessed was liable or otherwise. Here, however, where the assessment is made under Rules specially prescribed and is based on the Actuary's triennial valuation report which is entirely a different matter, such a question can hardly arise. The only question that can appropriately be raised is whether the assessment under Rules 25 and 35 as made by the Senior Income-tax Officer is correctly made or otherwise. Moreover, as shown in paragraph 22 below, in this case not an iota of premium income remained to be returned to the participating policyholders as bonus from surplus profits, the whole of it and something more having been swallowed in the payment of claims, expenses of management and the provision made to keep a sufficient amount of reserve against future liabilities. In such circumstances, how the question of assessing the premium income arises it is hard to understand. However, as I have no discretion in the matter, I have to submit the questions as put for such consideration and reply as your Lordships might be pleased to give.

12. As far as I can make out, the only contention of the Company is that it is a mutual concern like the New York Life Insurance Company and that as the House of Lords in the above case of *Styles* v. *The New York Life Insurance Company*,(1) decided that profits due to the excess contributions of participating policyholders were exempt, the premium income of the Company from its participating policyholders is exempt and that therefore the Company should have been exempted from the tax.

13. Before we can apply the above decision of the House of Lords to this case, three things have to be considered viz., (1) Whether the facts of this case are similar to those in the case before the House of Lords, (2) Whe-

(1) 2 Tax Cas. 460; 14 App. Cas. 381.

ther the law under which the decision of the House of Lords was given was the same as that under which the Company in the present case has been assessed and (3) What exactly the House of Lords did decide.

14. Though this decision of the House of Lords having been given under the English Income-tax Acts is not binding on us, yet due weight must be given to it so far as it goes if the facts of the two cases be the same and if the law under which the House of Lords gave its decision be the same as the law under which this assessment has been levied.

15. It will be better to see first of all whether the facts of the two cases are similar or otherwise. The facts of the New York Life Insurance Company's case are clearly stated as under by Lord Watson in his judgment:—

"The rate of premiums paid for participating is different from that which applies to non-participating policies and is, moreover, not fixed but fluctuating. A calculation is made of the probable disbursements of the Company on account of expenses and other liabilities; and the amount claimed as premiums for policyholders, who are members, is adjusted in conformity with that estimate. Then an account is annually taken of the transactions of the Company, and the excess, if any, of premiums received from these members over expenditure for which they are responsible is, after carrying part to a reserve fund, returned or repaid to them, either in the shape of bonus additions to their insurances, or by a deduction of the future premium required from them.

"Besides issuing life policies, the appellant company insures, without participation, sums payable at fixed future periods, sells annuities and has funds invested which bear annual interest.....With these profits and with the income derived by the Company from its investments we have no concern. This appeal is limited to the surplus arising upon its English transactions in participating or members' policies."

As regards interest income, Lord Fitzgerald in his judgment says that it is paid in cash to policyholders. He states. "In making this estimate, each member is to be credited, first with his proportionate share of the premiums earned, after deducting losses and expenses, and secondly, his proportionate share of the profits derived from investments; the latter is to be paid in cash. For his proportionate share of the premium earned, he is to be entitled to a certificate on the books of the Company of the amount remaining to his credit in the said Company, such certificate to contain a proviso that the amount therein is liable for any future loss by the Company. The amount so certified is not paid to the policyholder and may never be."

From the above extracts, my Lords, it will be clearly seen that in the case of the New York Life Insurance Company, income from investments was treated entirely separately and distributed separately to policyholders in cash and not mixed up with the premium income. The rates of premium were fluctuating and were fixed after taking into account the probable disbursements of the company on account of expenses and other liabilities. If the estimate so made was found to be excessive, as regards a participating policyholder's share in the surplus arising, a certificate was given of the amount due to him with a proviso that it was liable for future losses by the Company with the result that the amount so certified might never be paid. Now what do we find in the case before us? From Article 85 of its Articles of Association (Exhibit A. page 30) as subsequently amended in 1890, it

will be seen that the interest income is not separately accounted for. It is combined with all other income. No separate account is kept of the premium income from the participating policyholders and the interest income is not separately distributed in cash as in the case of the New York Company. The Actuary works out the surplus profits by an actuarial valuation taking into account the Company's income from all sources and the surplus thus arising is distributed amongst the participating policyholders as bonus. There is no provision that this bonus is liable to future losses as in the case of the New York Company, the responsibility of each member of the Company to contribute to losses and the liabilities of the Company being limited to £ 1 only under Article III of the Memorandum of Association, Exhibit A. As regards the rates of premiums, Article 74 of the Articles of Association (Exhibit A, page 25) says that the Directors are to fix them subject to approval by the Actuary, and in its letter No. 67 of 25-8-1927, the Company has written to me as under:—"The rates of premia have remained constant since the inception of the Association."

It will be seen thus that they are constant and not fluctuating and have remained the same for the past 58 years during which the Company has been in existence. For all these reasons, the facts of the two cases do not appear to be similar. In the case before the House of Lords, the interest income on which everything depends was distributed in cash, the premium income from participating policies was separately dealt with, profit and loss therefrom separately calculated and the rates of premium fixed taking into account the liabilities and expenses. If there was any surplus, a certificate was given with a proviso that it was liable to future losses. In the case before us on the other hand, rates of premium have been constant for the past 58 years; ever since the formation of the Company, there is no separate calculation of profit from premia paid by the participating policyholders. Interest income and all other income is combined with this premium income and the profits are calculated for the Company as a whole by an actuarial valuation (Please see pages 10 and 11 of the last valuation report, Exhibit C). The surplus profit thus worked out is distributed without any liability for future losses. It may be added here that it makes all the difference whether the interest income and the premium income are considered separately or in combination. If in the present case, the interest income is separated from the other income there is not only no surplus profit but a heavy deficit as shown in paragraph 22 below.

16. In its petition of appeal to the Assistant Commissioner (Exhibit E) the Company states as under:—"A calculation is made by the Association of the probable death rate among the members and of the probable expenses and other liabilities and the amount claimed for premium from members is commensurate therewith." This is copied almost word for word from para 7 of the Statement of the Case by the Commissioners for General Purposes in the above case of the New York Life Insurance Company. That para 7 is as under:—"7. A calculation is made by the company of the probable death rate among the members of the company and of the probable expenses and other liabilities of the company and the amount claimed for premiums from the policyholders is commensurate therewith."

This statement of the Commissioners for General Purposes was based on clause 11 of the Charter granted to the New York Life Insurance Company but as far as the case before us is concerned, I find no authority for this statement in the petition of appeal. There is only Article 85 of the Articles of Association (Exhibit A) which does not say any such thing and as

a matter of fact, the Company's Solicitors have in a subsequent letter to me stated that this statement is "not entirely correct" and that "in calculating the premiums payable by members an estimate is made of the future death rate, of the expenses of management and of the interest that will be earned by the investment of the portion of the premiums not immediately required to pay claims." Even this does not appear to be correct as when I expressly asked the Company to state whether the rates of premia were being revised from time to time, it said that they have been constant from the date of inception of the Company i.e., for the past 58 years. All that I can see from the papers before me is that this Company is working out and dividing its surplus profits by way of bonus to participating policyholders just as every other life insurance company is doing.

17. From the above paragraphs, it will be seen that there are fundamental differences between the facts of the case before the House of Lords and the present case.

18. Next we have to consider whether the law which governed the assessment in the New York Company's case was the same as in the present case.

19. The taxable income in the case of the New York Company was not calculated on the lines of our Rules 25 to 35. The calculations were entirely different. The profit was arrived at by merely deducting from the bare premium income earned in the United Kingdom, claims under policies payable in the United Kingdom and the balance was assessed along with interest and other income for which there was no dispute. This will be evident from the following quotation from the judgment of Lord Fitzgerald in that case (2 Tax Cases at page 477):—"The Commissioners of Taxes were of opinion:—'1st that no part of the premium income of the Company received under participating policies is liable to be assessed to income-tax as profits or gains chargeable under Schedule D to the Act 16 and 17 Vic. C. 34.'" Is that opinion correct in law on the finding in the special case? Was the net balance of such premium income, after deducting all costs and expenses and so remitted to the head office in New York to be there invested, a part of the annual profits or gains of the Corporation in respect of their trade or employment of an insurance company in the United Kingdom?"

The surplus world profit of the New York Company as a whole as ascertained by the actuarial valuation was not taken into account and the assessment was not worked out under our Rule 35. In other words, the method of assessment adopted under Schedule D to the Act, 16 and 17 Vic. C. 34 was radically different from that laid down in our Rules 25 and 35. Now turning to the case before us, the Senior Income-tax Officer has first of all ascertained the surplus world profit of the Company as a whole according to the actuarial valuation as required by Rule 25 and then applying Rule 35 has found out the Indian profit as shown in detail in para 7 above. He has not merely taken the Indian premium income and deducted therefrom expenses incurred and claims paid here and taxed the balance remitted to Melbourne for investment there because that is not the method of assessment under the law in force here though it may be the method laid down by law for the United Kingdom. Thus the method of assessment followed under the English law is not the same as that followed in the present case.

20. Next we have to consider exactly what the House of Lords decided. The decision as summarised in 2 Tax Cases 460 is as under:—"*Held* by Lords Watson, Bramwell, Herschell and Macnaghten (Lord Hals-

bury L.C. and Lord Fitzgerald *dissenting*) that so much of the surplus as arises from the excess contributions of the participating policyholders is not profit assessable to income-tax."

Evidently this means that the net balance of the premium income from participating policies "after deducting all costs and expenses" is not profit because it arises merely from excess contribution of each participating policyholder. As stated by Lord Bramwell in his judgment, if half a dozen persons combined in any year and subscribed £ 10 each to be paid to the executors of any one of them who died within that year or to be divided, if more than one died, amongst the executors of the deceased, and if no one died within the year and the amount subscribed was returned to the subscribers or carried forward to the next year, it could not be contended that each of them made a profit of £ 10. Similarly if the policyholders of a mutual concern subscribed £ 100,000 for mutual insurance in any year and if only £ 90,000 were required to meet claims and the remaining £ 10,000 were returned to them, that would not be profit. This is what their Lordships have laid down. The decision merely affirms the obvious principle that if a man receives back a part of what he has contributed for a specific purpose because it is not required for that purpose, he receives no profit.

21. As shown in the foregoing paragraphs, the facts of the present case before your Lordships as well the law applicable thereto are different from the facts of the case before the House of Lords and the law applicable thereto. However, even if we admit for the sake of argument that the law and the facts in the cases are exactly the same, it still remains to consider how the decision of the House of Lords benefits the applicants here. We have not a separate account of the contributions of the participating policyholders, the expenses incurred and the claims paid in that connection and the reserves required for future liabilities made therefrom. However, as by far the major part of the policies issued by the Company are participating policies, the consolidated revenue account on pages 10 and 11 of Exhibit C will give some idea whether there could or could not have been any excess contribution by policyholders in this case.

22. The credit side of this revenue account includes £ 16,557,659-3-4 on account of the amount of fund on 1-10-1922 (the beginning of the triennial period) and £ 3,254,860-14-7 on account of interest. Omitting these two items, we get £ 8,225,032-11-1 on account of what may be styled the 'premium income'. The debit side includes claims paid, expenses of management, license fees and Government taxes and the amount of fund on 30th September 1925. Excluding the last item we get £ 5,460,302-2-1 on account of claims paid and expenses of management including the comparatively very small sum of £ 16,234-18-1 on account of fees and taxes. Besides, as per the actuarial valuation, £ 21,021,101-12-0 were required on 30-9-1925 to meet the "net liability" under "assurance endowment and annuity transactions," but as the life fund at the beginning of the period amounted to only £ 16,557,659-3-4 the difference between these two sums viz., £ 4,463,442-8-8 would be required in addition to provide for the "net liability" of the Company in full. Adding this amount of £ 4,463,442-8-8 to the figure of expenses and claims paid, we get in all £ 9,893,744-0-9. Since against this, the premium income was only £ 8,225,032-11-1 as stated above, far from there being any excess contribution by any one, there is a clear deficit of £ 1,668,711-19-8. Deducting from this the sum of £ 983,344 (£ 1,276,344-£ 293,000) on account of intermediate bonuses paid out of current revenue as stated on page 4 of Exhibit C, the net deficit works out to

£ 685,367-19-8. No one has thus contributed anything in excess of requirements for the life insurance business of the Company, but actually less has been contributed. The number of non-participating policyholders being only 2,840 against 174,889 participating policyholders, we can safely infer that the latter have not only not contributed anything in excess of the requirements but have actually subscribed less than was necessary. Thus even if we overlook the important differences between the facts of the two cases as well as between the laws respectively applicable to each of them, and apply the decision of the noble Lords in the New York Case to this case, there being no excess contribution whatsoever by the participating policyholders, there can be no relief whatsoever. It is only the inclusion of the interest income which in the case of the New York Company was being paid out in cash, that has given rise to some surplus profits. The very fact that though this interest income amounts to £ 3,254,860-14-7, the surplus amounts to £ 2,569,482-11-11 only after taking it duly into account, proves that there has been a deficit on account of the contributions made by policyholders. Look at the case in whichever way we will, the applicant's case derives no support from the decision of the House of Lords on which it rests entirely.

23. For all the above reasons, my answer to the questions put by the Company is that the assessment having been levied under Rules 25 and 35 of the Act and based on the actuarial valuation of the Company as a whole, the questions as framed do not properly arise in the case and that as the premium income from participating policyholders has been swallowed up by expenses incurred, claims paid and provision for future liabilities, it forms no part of the income ultimately assessed.

24. A copy of your Lordships' decision may kindly be certified to me as required by section 66 (5) of the Act.

When the reference came up for hearing before Martin C. J. and Blackwell J., the case was sent back to the Commissioner of Income-tax under Sec. 66 (5) of the Income-tax Act, for re-submission with his findings on the following questions as amended by their Lordships.

1. Whether in law Rule 25 is applicable in assessing the Company to income-tax or super-tax.

2. Whether in law the Company can properly be assessed under Rule 35 without the Commissioner first ascertaining and recording his finding that there was an absence of more reliable data than those mentioned in Rule 35.

3. Whether in law the existing assessment is valid and binding on the company.

The Commissioner of Income-tax thereupon submitted the following Supplementary Case

SUPPLEMENTARY CASE.

As directed in paragraph 12 of your Lordships' judgment delivered on the 13th December 1929 and sent to me for compliance with the Deputy Registrar's letter No. 128 of 10th January 1930, I have the honour to submit in consultation with the learned Advocate General and the learned Government Solicitor the following explanation and further information by way of supplement to my original letter of reference dated the 6th January 1928 and especially to paragraphs 7 and 8 of that Reference in the hope that this may explain to your Lordships how the Senior Income-tax Officer who was

the assessing officer in the case came to the conclusion that no "reliable data" were supplied to him and so levied the assessment under the provisions of Rule 35 calculating the total world income of the Company under Rule 25.

2. The Company being non-resident, the Senior Income-tax Officer was required to ascertain the total income of the British Indian Branches and accordingly by his letter No. Sc cf 1746 Insce of 1926-27 dated the 14th October 1926 to the Resident Secretary of the Company, he (the Senior Income-tax Officer) asked to be furnished with a copy of the duly audited Balance Sheet and Revenue account of the Indian business of the Company for the year ended 30th September 1925 and if this could not be complied with then the following information:—

(a) The total premium income of the Company as a whole (i.e., of the whole world business).

(b) The premium income of the Company in British India and,

(c) The net profit of the Company as a whole before charging income-tax thereagainst.

A copy of this letter is annexed hereto and marked Exhibit F.*

3. The Resident Secretary with his letter in reply dated 15th October 1926 sent a copy of the Company's Balance Sheet and Revenue account. This covered the whole world business of the Company and not the Indian business alone. A copy of the letter and a copy of the Balance Sheet and the Revenue Account are annexed hereto and marked as Exhibits G* and G-1.* The 'C' form which is the form of return to be filled in by a Company giving particulars of its income, profits or gains from business trade or commerce was not filled in by the Resident Secretary as called for.

4. The said Balance Sheet and Revenue Account of the Company as a whole did not furnish any information in regard to the income of the business of the Company in British India and as it had not furnished any duly audited Balance Sheet and Revenue Account of the Indian business, though expressly called for, and as it had not completed and returned Form C, the Senior Income-tax Officer, in the absence of any reliable data as to the total income of the British Indian business of the Company, decided to calculate the income, profits or gains of the Indian business by applying Rules 25 and 35 of the Income-tax Rules which rules under section 59 (4) of the Act have effect as if enacted in the Act. The Income-tax Officer accordingly gave notice to this effect to the Resident Secretary in his letter of 26th January 1927 and after an interview on the matter, the said Income-tax Officer gave details in his letter to the Resident Secretary of 9th February 1927, a copy of which is annexed and marked Exhibit No. H.* The matter was then taken up by the Company's Solicitors, Messrs. Craigie Blunt and Caroe.

5. Hereto annexed and marked Exhibit I* is a copy of a letter dated 10th February 1927 addressed by Messrs. Craigie Blunt and Caroe to the Senior Income-tax Officer, in which they argued that the Company being a Mutual Association was not liable to be assessed except on interest and dividends of any securities and moneys held by the Company in British India and on loans made to members and the Company declined to make a declaration of their income as required by the Income-tax Officer. Thereafter an interview took place on 17th February 1927 when the Senior Income-tax Officer told the Solicitors that he considered that the Company was assessable under Rule 35 whether it was mutual wholly or partly and it was

*Not printed.

arranged that the required information as to the figures of the premium received in British India for the triennium ending September 1925 should be cabled for from the Head Office; a copy of the order of the Senior Income-tax Officer recording what happened at the interview that day is appended as Exhibit J.*

6. By Messrs. Craigie Blunt and Caroe's letter dated 4th March 1927 the Income-tax Officer was informed that the premium received by the assessees in British India amounted to £ 88,355, which information was given under protest and with notice of intention to appeal. The Senior Income-tax Officer thereupon proceeded to calculate the income liable to tax under Rules 25 and 35.

7. I find as a fact from the correspondence above referred to and the proceedings of the Senior Income-tax Officer relating to the assessment of the Company that the information required by the Senior Income-tax Officer as to the income, profits and gains of the Company in British India was not furnished and that in fact the Company's Solicitors intimated in their letter to the Senior Income-tax Officer dated the 10th February 1927 (Exhibit I) that their clients could not make a declaration of their income and that under the circumstances there was no reliable data before the Senior Income-tax Officer and that the latter had to proceed to calculate the income liable to tax under Rule 35. In fact, as will appear, the contention of the Company throughout was that Rule 35 did not apply to the class of business which the company carried on as they were a Mutual Association and that any surplus in the Company's transactions are not profits within the meaning of the Act.

8. In order to calculate the income liable to tax in accordance with Rule 35, the Senior Income-tax Officer, in my opinion correctly, proceeded first of all to calculate the total world income of the Company as a whole and the only reliable method to arrive at the correct total income of a life insurance Company as a whole, be it resident or non-resident, is to work it out from the actuarial valuation in accordance with the method referred to in Rule 25 and hence that method was followed to ascertain the total world income of the Company as a whole. As this Rule 25 was made use of in arriving at the total world income of the Company, it too has been referred to in para 11 of the original Reference. After ascertaining this world income the British Indian income was worked out under Rule 35 as set out in para 7 of the original Reference.

9. The Solicitors and the Resident Secretary were expressly informed by the Senior Income-tax Officer that the Company was assessed under the provisions of Rule 35, and it was never suggested by them that Rule 35 was not applicable on the ground that the Company had supplied or could supply reliable data to ascertain its British Indian income. From the proceedings before the Assistant Commissioner, who was the appellate authority, it appears that the Company's representatives, while arguing the appeal, stated that in case the Company was held liable, they were prepared to admit the calculations made under Rules 25 and 35 of the taxable income. They wanted from the Assistant Commissioner a decision as to whether under the Indian Income-tax Act the profits of a Mutual Assurance Company were exempt from or liable to tax. A copy of the proceedings and decision of the Assistant Commissioner is annexed hereto and marked Exhibit K.*

*Not printed.

10. I desire to add that it was the Senior Income-tax Officer who made the assessment under section 23 of the Income-tax Act, 1922, and not the Commissioner and I have given the data that were before him when he made it and explained how he came to make use of Rules 25 and 35. Under the Income-tax Act, barring certain special cases, the Income-tax Officer makes an assessment and the Assistant Commissioner is the appellate authority. The Commissioner is under section 33 of the Act, merely given the power to revise of his own motion his subordinates' proceedings and orders but he is neither the assessing nor the appellate authority. Also, in case a Commissioner does exercise his powers of revision under section 33, no reference to the Hon'ble High Court can be called for on account of any point of law arising out of his order under that section. I crave leave to add these remarks so that your Lordships may find no difficulty in following that the proceedings referred to are those before the Senior Income-tax Officer and the Assistant Commissioner and not the Commissioner.

11. As regards paragraph 13 of your Lordships' Judgment, as this Reference has been made under section 66 (2) of the Act, at the instance of the Company and not under section 66 (1) of the Act by the Commissioner of his own motion, I beg respectfully to submit that I have no authority under the Act to add questions of law which the Company did not ask me to refer under the said section 66 (2). The question that Rule 35 was not applicable on the ground that the Company had supplied or could supply reliable data to ascertain its British Indian income was not raised in the appeal and I submit that no reference can lie on this point to the Hon'ble High Court as, under section 66 (2) of the Act, only questions of law arising out of the Assistant Commissioner's appellate order can alone be referred to the High Court.

12. As regards the remarks in para 14 of your Lordships' judgment, it will be seen that the Company had the fullest possible opportunity given by the Senior Income-tax Officer to put in reliable data and the Company have never suggested that it was prepared to submit any more data than has already been supplied on the Company's behalf.

13. I may further add that when the Company asked me to refer the case to the High Court, I enquired whether in case I took up the case under section 33 of the Act of my own motion the Company would be prepared to withdraw the application for a reference as per the proviso to section 66 (2) of the Act. The Company, however, did not agree and required me to obtain the decision of the High Court on the question submitted.

Coltman, instructed by Messrs. *Craigie, Blunt and Caroe,* for the Assessees.

The Advocate General with the *Government Solicitor,* for the Crown.

JUDGMENT.

BEAUMONT, C. J.:—This is a reference to this Court under section 66 (2) of the Indian Income-tax Act. The matter originally came before this Court consisting of Sir Amberson Marten, C. J. and Mr. Justice Blackwell on 13th December 1929 and it was then referred back to the Commissioner to find further facts and it was suggested by the Court that the questions raised should be amended by asking 3 questions which are specified in the judgment. The first two questions are really subsidiary and the third

one is, whether in law the existing assessment is valid and binding on the Company. The Commissioner of Income-tax declined to raise that question taking the view that he had no power to do so. The case having been argued before us, it appears to us that that is the real question which arises and we propose therefore to amend the questions raised by raising that question in addition to the two questions actually raised in the case. In doing so, we are following the view expressed by the High Court of Allahabad in *Shiv Prasad Gupta* v. *The Commissioner, of Income-tax. U. P.*,[1] and in a later case *Messers. Kajorimal Kalyanmal* v. *Commissioner of Income-tax, U.P.*,[2] that the Court has power under section 66 (2) of the Income-tax Act to amend the questions asked by the Commissioner by raising the real question and then answering that question.

The two questions which were originally raised in the case really involve determining whether the principle of the decision of the House of Lords in *The New York Life Insurance Company* v. *Styles*,[3] applies to the Company.

The Commissioner has found the nature of the Company and I think it is only necessary to say that it is a Company limited by guarantee, has no share capital and under Article 6 of the Articles of Association every person who insures his life with the Company under a participating policy is to be deemed to be a member of the Company. The principle which the House of Lords laid down in *Styles's* case was this, that where you are dealing with a mutual insurance company the premiums paid by the policyholders who are to share in the whole of the profits of the company do not amount to profits or gains of the company which are liable to tax. The principle at the bottom of the decision is that a man cannot make a profit out of himself: if a number of persons contribute to a common fund which immediately or later is to come back to the subscribers then there is no profit which can be liable to tax and I see no reason why the principle of that case should not apply to the assessee Company in this case. I therefore think that any premiums paid by those entitled to participate in policies who become thereby the members of the Company are not profits of the Company.

But then the question arises, on what income ought this assessee Company to be assessed? Now in *Styles's* case the Commissioners of Inland Revenue whose decision was upheld by the House of Lords, had decided, firstly that no part of the premium income of the company received under participating policies is liable to be assessed to income-tax as profits or gains and secondly that the company was liable to be assessed (a) in respect of profits made on annuities granted, (b) on profits made from premiums paid under non-participating policies, (c) on all income derived by or from investment of all premiums paid to them in the United Kingdom or abroad and as to the latter when such money is received in the United Kingdom and (d) on all profits, if any, derived in any mode other than by the annual premium contributions of the participating policyholders. It seems to me that that is a finding that the whole of the income of the company derived from sources other than contributions by the participating policyholders was liable to tax, and that seems to me to presuppose that the premiums paid by the participating policyholders must be the first fund to bear the expenses of manage-

(1) 3 I. T. C. 406.
(2) 3 I. T. C. 451.
(3) 2 Tax Cas. 460.

ment and so forth. That, I think, is borne out by the opening argument of Mr. Finlay, as he then was, in which he says:—"The question is whether where members of a mutual insurance company make contributions towards the expected expenses, and there is a surplus after paying the expenses, income-tax is payable upon the surplus which is returned to the contributors". Clearly in that case the House of Lords was only dealing with the actual surplus of the premiums after payment of expenses, but the principle upon which the decision rests covers, I think, the whole of the premium. It seems to me therefore that in this case the Company ought to have been charged upon its income derived from investments and on profits from non-participating policies or any other sources except the contributions from the participating policyholders. So far as Indian Income-tax is concerned, it is of course only chargeable *prima facie* on those sources of income in so far as they accrue or arise or are received in India.

Now it is the duty of the assessee Company under section 22 (1) of the Indian Income-tax Act to make a return of the total income of the Company during the previous year, the "total income" defined in section 2 (15) as total amount of income, profits and gains from all sources to which the Act applies. If the Company does not make a return, then under section 22 (4) the Income-tax Officer has to make the assessment to the best of his judgment. The assessee Company did not make any return of the income upon which in my view they were liable to tax. On the 10th of February 1927 their Solicitors wrote a letter to the Senior Income-tax Officer in which they stated that they were only liable to be taxed on the interest and dividends of any securities and moneys held by them in this country and on the interest on loans made to members after making a reasonable allowance for office expenses, and they offered to make a declaration of their actual income on those lines. But that clearly was not enough, because they would have had to include in their return any profits made from non-participating policies issued in India. At any rate they did not in fact make any return. That being so, the Senior Income-tax Officer in the first instance made an assessment applying Rules 25 and 35 of the Rules made under section 59 of the Act which under that section have statutory effect.

Rule 25 provides:—"In the case of life insurance companies incorporated in British India whose profits are periodically ascertained by acturial valuation the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation" and the proviso allows certain deductions. It is to be noticed that that rule applies to life insurance companies incorporated in British India and as the assessee Company is not incorporated in British India, it is in my view plain that Rule 25 has no application to the present case. Then comes Rule 35 which says:— "The total income of the Indian branches of non-resident insurance companies (Life, Marine, Fire, Accident, Burglary, Fidelity Guarantee etc.,) in the absence of more reliable data, may be deemed to be the proportion of the total income, profits or gains of the companies corresponding to the proportion which their Indian income bears to their total premium income". It is to be observed that this rule is only to be applied in the absence of more reliable data. The learned Commissioner has in his supplemental case referred to us pursuant to the judgment of this Court to which I have referred, stated as a fact that he had no reliable data. I agree with him that it was not possible on the materials before him to assess this Company in the manner in which, as I have indicated, I think that it ought to have been assessed. I think therefore he was justified in applying Rule 35.

Now in order to apply Rule 35 he has first of all to find out what is the total income, profits or gains of the assessee Company. What he had got was a triennial valuation, but without any more reliable data I think he was justified in saying that he must assume that the profits for the year in question would be the average annual profits shown in the triennial valuation: that is to say, in order to make the best assessment he can under section 23 (4) of the Act, he arrives at the same result as he would reach if Rule 25 applied. Now, under the triennial valuation it appears that the Company has certain sources of income which are plainly taxable. As appears from page 10 of Exhibit C it has got consideration for annuities granted £ 91,000 odd, interest £ 3,000,000 odd, fees, £ 600 odd, consideration for reinsuring liability of other companies £ 1,500,000 odd. All those are sources of income which are taxable leaving out of account premiums of participating policies which as I have already said are not in my view taxable. The receipts from those taxable sources are greater than the profits for the period shown in the account, so that some expenses must have been deducted from those taxable sources of income. I think therefore that the Commissioner was justified in coming to the conclusion that the profits shown in the triennial account did in fact represent taxable profits. In doing so he has not taken into account as taxable profits premiums paid on participating policies; he has taken the other sources of income and deducted from them the balance of expenses remaining over after the premiums on participating policies have been wiped out. Having arrived in that way at the total income, profits or gains of the Company he then under Rule 35 had to find out the proportion of the Indian income and he did this by taking the proportion which the Indian premium income bears to the total premium income. The figures are shown in the case. The result is, I think that the existing assessment is substantially binding on the Company though I arrive at that conclusion by a different road to that which the Commissioner took.

I answer the first question—Whether the premium income received by the Association from its members under participating policies or any part thereof is liable to be assessed to income-tax as profits or gains of a business under section 6 (iv) and section 10 of the Indian Income-tax Act XI of 1922—in the negative. I answer the second question—Whether such income or any part thereof is liable to be assessed to income-tax or super-tax as income, profits or gains under any other and if so under which of the provisions of the said Act—by saying that such income is not liable to assessment. I answer the third question raised, whether in law the existing assessment is valid and binding on the Company, by saying that an assessment equal in amount to the existing assessment is binding on the Company.

As regards costs, there will be no order.

MURPHY, J.:—I also answer the questions put to us in the same way as has been done by My Lord the Chief Justice for the same reasons to which I have nothing to add.

(428) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Addison and Mr. Justice Bhide.

(5th February, 1931).

The Electric and Dental Stores .. *Assessees.*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 10 (2) (ix)—Firm, assessment of—Partner's salary, when deductable—Commissioner's decision, if res judicata *in succeeding years.*

A decision by the Commissioner of Income-tax allowing partner's salary as a business deduction in the assessment of the firm's profits in a particular year does not operate as res judicata *and cannot bind his successor in a subsequent year.*

Salary charged by working partners in a firm would be admissible as a deduction in the computation of the profits of the firm under Sec. 10 (2) (ix) of the Income-tax Act, if those partners were true employees and the payment of salary to them was bona fide and not a devise to escape income-tax.

Commissioner of Income-tax, Madras v. *Vegaraju Venkatasubbayya,* 1. I.T.C. 176. Considered.

Case [Civil Reference No. 30 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces, for the opinion of the High Court.

CASE.

By a combined application under sections 33 and 66 (2) of the Income-tax Act I am asked to review the assessment of the petitioner, or in the alternative to refer for the decision of the High Court of Judicature at Lahore the following points arising out of an order passed under section 31 of the Act in connection with the assessment for the year 1929-30.

(1) Whether the order of Mr. M. L. Darling in the petitioners' assessment case for 1923-24 allowing the salaries of two of the partners as a business deduction does not operate as *res judicata,* especially when no fresh facts justifying the re-opening of the question of partners' salaries have been put forth and proved by the assessing authority.

(2) whether the salaries charged by the working partners 1 and 2 are not legal expenses incurred for the purposes of earning profits within the meaning of section 10 (2) (ix) of the Income-tax Act; and

(3) whether in view of the fact that interest charged by the partners on the amounts due to them from the partnership as distinguished from the capital originally advanced was being allowed as a business deduction year after year in the assessments made against the partnership, the Income-tax Officer was not estopped from opening the question of interest so charged by the partners in the absence of any fresh facts justifying the disallowance.

I have reviewed the case under section 33 of the Act in respect of the third point, which need not in the circumstances be referred to the High Court.

2. *FACTS OF THE CASE.*—As regards the remaining points (1) and (2) the facts are that the firm consists of five partners, two of whom are Government Officials, who along with another are sleeping partners, while the remaining two work as Managing and Assistant Managing partners respectively. The latter receive at present in addition to their shares of the profits, salaries of Rs. 300 and 180 p.m. respectively for their services. In connection with the assessment for 1923-24, when the salaries paid were Rs. 135 and 110 p.m. respectively, the claim was disallowed by the Income-tax Officer, but in review the then Commissioner of Income-tax allowed it in consideration of the fact that the salaries were reasonable and were duly authorised by the partners. Since then the salaries of these two partners which have gone on increasing were allowed as deductions up to the assessment for 1929-30, when they were disallowed in view of the ruling by the Madras High Court in the case of *Board of Revenue* v. *Vegaraju Venkata Subbaya Garu,*[1] in which it was held that salaries paid to partners of a firm are not admissible as deductions in the computation of the profits of the firm for income-tax purposes and hence the partners' drawings are taxable. An appeal against the disallowance of the claim in 1929-30 followed with the result that the order of the Income-tax Officer was upheld.

3. *OPINION OF THE COMMISSIONER.*—In regard to the first point the Hon'ble Judges of the High Court of Judicature at Lahore in the case of *Messrs. Deokinandan and Sons* v. *Commissioner of Income-tax, Delhi,*[2] concurred in the ruling of the Madras High Court in the case of *T. M. M. Sankaralinga Nadar* v. *Commissioner of Income-tax Madras,*[3] in which it was held that if in a previous year of assessment a decision was arrived at after investigation and inquiry that certain deductions ought to be made it is still open to the Income-tax authorities to re-open the question in a subsequent year of assessment and the authorities not constituting a court are not barred by the principle of *res judicata.* It was also held that though they are entitled to re-open the enquiry they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. It was added that "the principles of natural justice or judicial dealing which Courts impose upon Income-tax Officers would prevent them from capriciously setting aside the order of their predecessors based on an enquiry. But if fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessors he is entitled to re-open the question."

The question whether the salaries paid to partners is a legitimate deduction under section 10 (2) of the Act is one of law. The only clause of this section under which a deduction for salaries could possibly be considered is clause (ix) which allows a deduction for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The payment of salaries to employees would be a deduction allowable under that clause, but partners' salaries come under a different category. They are nothing more or less than the drawings of partners and as held by the Madras High Court in the case of *Vegaraju Venkatasubbaya Garu* cited previously, the drawings of partners by whatever name they are described are part of the profit and therefore taxable.

(1) 1 I. T. C. 176 (2) 4 I. T. C. 398 (3) 4 I. T. C. 226

In regard to the question of *res judicata,* so far as this case is concerned, can it be said that if any Income-tax authority has previously allowed a deduction of this kind under a misconception of the law, or as a matter of doubt, such conception or doubts would debar another Income-tax authority, armed with definite legal authority on the point, from coming to a different conclusion? The answer seems to me to be self-evident. It may reasonably be said that the subsequent possession of definite legal authority sheds fresh light on the point, which would justify an Income-tax Officer in acting in accordance with legal authority. I would, in the circumstances, answer the first question in the negative holding that in the circumstances, the re-opening of the question was justified, and in view of the decision referred to above, I would also answer the second question in the negative.

Kirpa Ram Bajaj, for the Assessees.

R. C. Soni, for *Jagan Nath Aggarwal,* for the Crown.

JUDGMENT.

ADDISON J.:—This is a reference by the Commissioner of Income-tax for the Punjab, N. W. F. and Delhi Provinces under section 66 (2) of the Income-tax Act. The firm in question consists of five partners two of whom are Government officials, who along with another are sleeping partners while the remaining two work as managing and assistant managing partners respectively. In the year 1923-24 the two last named received salaries of Rs. 135 and Rs. 110 per mensem respectively. It was then claimed that these salaries should be deducted from the profits before the assessment of income-tax was made. This claim was disallowed by the Income-tax Officer, but allowed on review by the then Commissioner of Income-tax. Since then the salaries of these partners have gone on increasing and were in the year of assessment 1929-30 Rs. 300 and Rs. 180 respectively. In that year they were disallowed in view of the ruling of the Madras High Court in which it was held that salaries paid to partners of a firm were not admissible as deductions in the computation of the profits of the firm for income-tax purposes.

The questions referred to us for decision are as follows:—

1. Whether the order of Mr. M. L. Darling in the petitioners' assessment case for 1923-24 allowing the salaries of two of the partners as a business deduction does not operate as *res judicata,* especially when no fresh facts justifying the re-opening of the question of partners' salaries have been put forth and proved by the assessing authority?

2. Whether the salaries charged by the working partners 1 and 2 are not legal expenses incurred for the purposes of earning profits within the meaning of section 10 (2) (ix) of the Income-tax Act.

As regards the first question the answer must obviously be that the decision of Mr. M. L. Darling in a particular year cannot bind his successor in a subsequent year.

As regards the second question, it appears to me to be one of fact. I am of opinion that the decision of the Madras High Court, *Chief Commissioner of Income-tax* v. *Vegaraju Venkatasubbaya*[1] that salaries paid to the partners of a firm are not admissible as deductions in the computation of

(1) 1 I. T. C. 176

the profits of the firm, is stated too broadly. A similar question came before the Judicial Commissioners of the Central Provinces and Berar in *Ramakrishna Ramnath* v. *Commissioner of Income-tax, C. P. and Berar,*[2]. In that case the Commissioner of Income-tax in referring the question said: "A partner might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm. But obviously considering the opportunities for fraud that any such alleged arrangement would offer, very strict proof would reasonably be required of the existence of such an arrangement." The learned Judicial Commissioner quoted this remark and then went on to say as follows:—"But even if the terms of the partnership deed indicated that one partner was so to do business, the Commissioner is not bound to hold that this is the case as a statement in the partnership deed might be intended to assist escape from the provisions of the Income-tax Act." The only answer which the Judicial Commissioners were therefore prepared to give was the statement of the law made by the Commissioner of Income-tax.

This matter is also mentioned at the bottom of page 481 of Sundaram's Law of Income-tax in India, second edition, where it is said:—"If however a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of the profits, the salaries could be allowed as a deduction. The dual capacity of a partner *cum* employee, though suspect, is possible and to the extent that the person is in truth an employee the salary is deductible from the profits of the partnership".

My answer to question 2 would be as given above and with that statement of the law it remains for the Income-tax Commissioner to see whether as a fact these particular partners are true employees or whether the payment of salaries to them is a device to escape income-tax. The amount of the salaries as compared with the profits and the rate of interest earned on the capital might help the Commissioner in coming to a decision whether these salaries are *bona fide* paid to the partners as employees or not. There may be of course many other considerations all of which he should take account of before coming to his finding.

I would make no order as to costs.

BHIDE, J.:—I agree.

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(429) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Jai Lal and Mr. Justice Agha Haidar.

(6th February, 1931.)

Sri Gopalji Company .. *Assessee.*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922)—Partnership contravening provisions of Companies Act—Illegal constitution, if bar to assessment—Business of sale of cotton ginned elsewhere—Ginning machines, Depreciation allowance for, if claimable—Machinery not used in business assessed.

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(2) 4 I. T. C. 171.

The assessee, Sri Gopalji Company constituted by thirteen firms as partners with specified shares, was carrying on the business of purchase and sale of cotton. Each of its constituent firms was separately assessed to income-tax and had a number of partners, the aggregate of such partners being 133. The Company and the constituent firms were not registered under the Indian Companies Act or under the Indian Income-tax Act. The business of the Company was to purchase cotton in open market and after getting it ginned by the constituent firms at a fixed fee, to sell the same thereby making a profit. On an assessment of these profits to income-tax and super-tax,

HELD, that the Company was assessable as a firm or an association within the meaning of the Income-tax Act, its illegal constitution on account of the non-compliance with the provisions of the Companies Act not affecting its liability to assessment on its profits.

HELD further, that the Company was not entitled to any allowance for depreciation of machinery, plant and buildings owned or leased by the constituent firms, the machinery, etc., not being used by the Company in its business of purchase and sale of cotton assessed to tax.

Case [Civil Reference No. 9 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces for the opinion of the High Court.

CASE.

In an application under section 66 (2) of the Indian Income-tax Act (XI of 1922) the Sri Gopalji Company of Multan, hereinafter referred to as the assessee firm, has requested me to refer to the High Court certain questions of law arising out of an order passed under section 31 of the Act by the Assistant Commissioner of Income-tax, Western Division, Punjab, relating to the assessment made on the firm by the Income-tax Officer, Multan, for the year 1928-29.

2. **Facts of the case:** The assessee firm consists of the following thirteen partners with the shares indicated:—

1.	Seth Matwal Das Co., Multan.	35/413
2.	Sri Devraj Co., Multan.	24/413
3.	Messrs. Dhannaram Lekhraj Co., Multan.	46/413
4.	Sri Chandar Dev Co., Sham Kot.	40/413
5.	Sri Ganesh Co., Multan.	38/413
6.	Sat Narain Co., Multan.	38/413
7.	Messrs. Bulichand Multanichand, Multan.	38/413
8.	Sri Narankar Co., Multan.	36/413
9.	Sri Onkar Co., Multan.	32/413
10.	Messrs. Tekchand Jessaram, Multan.	30/413
11.	Sri Maharaj Co., Multan.	22/413
12.	Messrs. Rupchand Jassuram, Multan.	21/413
13.	Messrs. Gangaram Jesmal Factory, Multan.	13/413

Each of these partners is an unregistered firm within the meaning of the Income-tax Act, and is separately assessed. These unregistered firms in turn are composed of a number of individual partners, and the total number

of individuals thus concerned in the assessee firm is 133. The assessee firm is however not registered as a company under the Indian Companies Act.

2. The business carried on by the assessee firm was the purchase and sale of cotton. The method of business was that the assessee firm purchased raw cotton, had it ginned by the constituent firms on the payment of a specified rate per maund, and then sold it. The assessee firm maintained a separate establishment and accounts, and borrowed money from banks on its own account and independently of the constituent firms.

3. For the assessment of 1928-29 the assessee firm returned an income of Rs. 22,495-9-6. The Income-tax Officer, Multan, called for the accounts and examined them, and after adding back certain items which he held to be inadmissible deductions arrived at an assessable income of Rs. 53,707, which he charged to income-tax and super-tax in accordance with the provisions of the Act for the assessment of an unregistered firm.

4. Against this assessment the assessee firm lodged an appeal before the Assistant Commissioner on the following three main grounds:—

(a) That Sri Gopalji Company is composed of about 133 individuals who constitute 'persons' for the purpose of section 4 of the Indian Companies Act and being thus a partnership forbidden by the Companies Act unless registered in accordance with the provisions thereof it cannot be rccognised as a legal entity by the Income-tax Officer.

(b) That the Income-tax Officer has erred in not allowing depreciation in respect of the plant, machinery and buildings in accordance with the rules.

(c) That the sum of Rs. 5,417-7-0 on account of interest paid should have been allowed as deduction by the Income-tax Officer. The interest paid to some of the partners was paid on account of *bona fide* loans advanced to Sri Gopalji Company in excess of the stipulated capital.

The Assistant Commissioner, after giving a hearing to the assessee firm's representative, recorded an order under section 31 in which he disallowed each of these objections and rejected the appeal.

5. The assessee firm has now made an application to me under section 66 (2) of the Act to refer to the High Court the questions of law arising out of the Assistant Commissioner's order rejecting the appeal. As I am of opinion that questions of law arise in connection with the objections (a) and (b) mentioned above, I make the present reference. I shall not however refer any question relating to the third objection for the following reasons.

6. The Income-tax Officer disallowed the claim for the deduction of interest paid on alleged loans from partners because he was not satisfied that any interest had been paid on such loans as distinguished from the interest paid, in accordance with the deed of agreement determining the constitution of the assessee firm, on the ordinary initial capital. The Assistant Commissioner in appeal rejected the objection on the ground that no evidence had been adduced before him in support of the claim that interest was paid on loans made by the partners. I have however again had the accounts examined and allowed the assessee firm an opportunity of indicating the evi-

dence on which it relies in support of this claim. As a result of this inquiry I have satisfied myself that it is not possible to determine whether any portion, and if so what portion, of the interest credited in the partners' accounts was paid in respect of advances other than the ordinary capital. Since the facts relating to this claim have not been proved, I do not consider that any question of law arises in this connection.

7. Questions of law referred: The two questions of law which arise in connection with the remaining objections may be formulated as follows:

(1) Was the Sri Gopalji Company, which was not registered under the Indian Companies Act, although it was a partnership of thirteen unregistered firms composed in turn of individual members the aggregate number of whom exceeded twenty, liable to assessment to income-tax on its profits?

(2) Was the Sri Gopalji Company entitled to any allowance on acccunt of depreciation of the machinery, plant and buildings owned or leased by the constituent firms?

8. Opinion of the Commissioner: In my opinion the answer to the first question should be given in the affirmative, for the reasons recorded by the Assistant Commissioner, with which I entirely agree. An illegal partnership is nonetheless an existing partnership, and may be a firm within the meaning of the Income-tax Act. It would indeed be anomalous if the assessee firm could plead its own illegality in order to secure an advantage in respect of taxation as compared with a partnership which has duly complied with the law of the land. In my opinion it would be reasonable to hold that the only relevant effect of this illegality is that it is open to the Income-tax department to recognise or to ignore the existence of this partnership according as it suits the interests of the Revenue.

9. The second question should in my opinion be answered in the negative. Section 10 (2) (vi) of the Act provides an allowance for depreciation of buildings, machinery and plant which are "the property of the assessee", and are used for the purposes of the business. In this case the the constituent firms alone carried on the business of ginning, for which they received payment at a specified rate per maund from the Sri Gopalji Company. In this business they employed the factories and plant which belonged to them and not the Sri Gopalji Company. It is in assessing the profits made by the constituent firms in the business of ginning cotton that the depreciation of the factories and plant employed is to be set off, and the allowance has therefore rightly been made in their individual assessments and not in the assessment of the Sri Gopalji Company.

Assessee unrepresented.

J. N. Aggarwal for the Crown.

JUDGMENT.

JAI LAL J.:—This is a reference under section 66 of the Indian Income-tax Act, 1922, made by the Commissioner of Income-tax, Punjab. The following questions have been referred for the opinion of this Court:—

(1) Was the Sri Gopalji Company, which was not registered under the Indian Companies Act, although it was a partnership of thirteen unregistered firms composed in turn of individual members the aggregate number of whom exceeded twenty, liable to assessment to income-tax on its profits?

(2) Was the Sri Gopalji Company entitled to any allowance on account of depreciation of the machinery, plant and buildings owned or leased by the constituent firms?

The Income-tax Commissioner has invited us to answer the first question in the affirmative and the second in the negative, and after a consideration of the case, I am of opinion that our answers should be as suggested by him.

The assessee, the Sri Gopalji Company, was not represented before us, but Mr. Jagan Nath Aggarwal, who appeared for the Income-tax Commissioner, placed all the circumstances and relevant provisions of the law before us.

The following are the facts of the case:—

The Sri Gopalji Company carries on the business of purchase and sale of cotton in this province and thirteen firms constitute its partners. The shares of these firms in the Company are fixed by contract, and it appears that in their turn the firms have a number of partners respectively, the aggregate number of such partners being 133 at the time of the assessment. Each of these firms is unregistered within the meaning of the Indian Income-tax Act and under the Indian Companies Act as well. The Sri Gopalji Company is also not registered under the Indian Companies Act and is an unregistered firm within the meaning of the Indian Income-tax Act. The *modus operandi* of its business is to purchase cotton in the market and get it ginned by its constituent firms on payment of a fixed fee per maund for the work done by such constituent firms. The cotton so ginned is then sold in the market and in this manner profit is made by the Sri Gopalji Company. The constituent firms are separately assessed to income-tax, and there is no question before us as to the legality or propriety of their assessment to income-tax. It is, however, contended on behalf of the Sri Gopalji Company that, as section 4 of the Indian Companies Act provides that no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business except the business of banking that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under the Act or other specified provisions of law the Company has not been properly and legally constituted it must, in the eyes of law, be deemed not to exist and is not, therefore, capable of being assessed to income-tax.

Section 3 of the Indian Income-tax Act, however, makes the income-tax leviable in respect of all income, profits and gains of every individual, Hindu undivided family, company, firm and other association of individuals. The expression "Company" has been defined in section 2 (6) of the Act to mean "a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession" and to include "any foreign association carrying on business in British India whether incorporated or not". The Sri Gopalji Company, therefore, is not a company as defined in the Indian Income-tax Act. It, however, does fall within the definition of a "firm" or "other association of individuals". The fact that in section 3 of the Indian Income-tax Act the legislature drew a distinction between a company and a firm and other association of individuals clearly shows that the provisions of the Indian Companies Act do not prevent an association formed for the purpose of doing business from being made liable

to income-tax on its profits even if it has not been registered in accordance with the law relating to the incorporation of companies.

The claim of the Company is, in my opinion, preposterous on the face of it. It amounts to this that, because the assessee is carrying on business without complying the provisions of the law as to the mode of its constitution, it is not liable to pay income-tax on its profits. It is all the same a firm or an association within the meaning of the Indian Income-tax Act. For analogous cases reference may be made to *Birendra Kishor Manikya v. Secretary of State of India* .[1] in which it was held that *abwab* income illegally realised by the assessee was liable to be assessed to income-tax, and to *In Re. Chunni Lal Kalyan Das.* [2] where it was held that income or profits derived by the assessee from wagering contracts was liable to income-tax. In my opinion, whatever penalties or disabilities the Sri Gopalji Company may have incurred by not complying with the provisions of the Indian Companies Act the matter does not affect its liability to pay income-tax on its profits.

With regard to the second question, it is claimed by the assessee that it is entitled to an allowance on account of depreciation of the machinery, plant and buildings owned or taken on lease by the constituent firms, but it has been pointed out by the learned Commissioner that such constituent firms have been separately assessed to income-tax in respect of their income and in such assessment allowance has been granted to them for the depreciation of the machinery, plant and buildings. The Sri Gopalji Company is not directly assessed to income-tax on the income of these constituent firms. Under section 10 of the Indian Income-tax Act an allowance has to be given to the assessee on account of depreciation of buildings, machinery, plant or furniture if they are used for the purposes of the business in respect of the profits whereof the assessment is made. The machinery, plant and buildings, on which an allowance for depreciation is claimed in this case are not used in the business of purchase and sale of cotton in respect of which the Sri Gopalji Company has been assessed. In my opinion, the claim of the Company for an allowance on account of depreciation is untenable.

I would, therefore, answer the first question in the affirmative and the second in the negative and direct that the Sri Gopalji Company should pay the costs of the Income-tax Commissioner.

AGHA HAIDER, J.:—I agree

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(430) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice and Mr. Justice Mukerji

[16th February, 1931.]

Lachiram Basantlal and others .. *Assessees*

v.

The Commissioner of Income-tax, Bengal.

Indian Income-tax Act (XI of 1922), Sec. 66-A—Notice for return, abandonment by subsequent invalid proceedings—Leave to appeal to Privy Council, Grant of.

The question whether a notice calling for return issued by the proper Income-tax Officer had been abandoned by reason of subsequent proceedings taken by a Special Income-tax Officer which came to nothing, is not one

(1) 1 I. T. C. 67 (2) 1 I. T. C. 418

of special importance for the issue of a certificate as a fit case for appeal to the Privy Council under Sec. 66-A of the Income-tax Act.

Application for the grant of certificate of leave to appeal to His Majesty in Council against the judgment of the High Court dated the 24th November, 1930 on a Reference under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) reported as 5 I. T. C. 114.

JUDGMENT.

RANKIN, C. J. :—This is an application for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council. The judgment of this Court complained of is a judgment given in a Reference under the Indian Income-tax Act and according to the decision of their Lordships of the Privy Council in *Delhi Cloth & General Mills Co., v. The Commissioner of Income-tax, Delhi* [1] the matter has to be treated as though it came under the principles applicable to clause (c) of section 109 Civil Procedure Code. In the present case, I am not prepared to say that there was no question of law in the judgment of this Court but it appears to me that the question which fell for decision was not such as to come within that clause. The position was that the assessees were unable to resist upon the merits of the claim made against them for income-tax. In due course the ordinary Income-tax Officer issued a notice against them calling for a return. Thereafter a Special Officer, who has since been held to have been invalidly appointed issued a fresh notice and took fresh proceedings which occupied considerable time and ultimately came to nothing. Thereupon the Income-tax authorities proceeded upon the original notice given by the proper Officer. The only question was whether in the special circumstances it could validly be contended that the original notice had been abandoned and could not be founded on. The view of this Court was against the assessees on that point. It does not seem to me that this is a case which ought to be dealt with on the footing that there is any special importance in the matter or special reason for taking the matter on appeal to England. In these circumstances, the application must be dismissed. There being no appearance for the respondent, there will be no order as to costs.

MUKERJI, J. :—I agree.

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(431) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

[18th February, 1931.]

Messrs. Sarjoo Pershad Gauri Shankar .. *Assessees*

v.

The Commissioner of Income-tax, United Provinces .. *Referring Officer*

Indian Income-tax Act (XI of 1922) Secs. 22 (4) & 23 (4)—Return, non-submission of—Assessment based on assessee's accounts, appealability of.

Where on failure to submit a return, the Income-tax Officer after examining the assessee's account books arrived at a figure and assessed accord-

(1) 2 I. T. C. 439

ingly, the assessment was one to the best of the Officer's judgment and not appealable, the provisions of section 23 (4) being mandatory.

Application [Miscellaneous Case No. 76 of 1931] made under Section 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, United Provinces to state a case for the opinion of the High Court.

JUDGMENT.

This is an application on the part of a firm styled Messrs. Sarjoo Pershad Gauri Shankar of Rasra praying that the Commissioner of Income-tax may be directed to state a case.

We have gone through the application and the affidavit but we do not find that there is any substance in the application.

It appears that the applicants were directed by the Income-tax Officer to make a return of their income. This they failed to do. One of the principal partners, Mr. Sarjoo Pershad said that he was too ill to prepare a return and that he was not in a position to take the responsibility of making a return, as he himself had not gone through the account. In the circumstances, the Income-tax Officer said that he would go through the account books and arrive at a figure after examining the books. This he did, and in the result he made an assessment "to the best of his judgment".

As a result of this assessment to the best of the Income-tax Officer's judgment, no appeal lay against the assessment. The firm complains that it was misled by the order of the Income-tax Officer, inasmuch as he directed that in future the firm should make a return, but in that particular year he was going to make an assessment after looking into the account books of the firm. This misled the applicants, otherwise they would surely have made a return.

We do not see how the Income-tax Officer could have ever told the firm that he was in a position to make an assessment which would not be "to the best of his judgment" and which would be appealable, although the firm failed to make a return. The provision of section 23 (4) is to the effect that whenever there is a failure to make a return, there must be an assessment to the best of the judgment of the Income-tax Officer. This position as in law could not be got over by the Income-tax Officer and it is idle to say that the Income-tax Officer misled the applicants.

We dismiss this application.

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(432) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

[18th February, 1931.]

The Suratee Bara Bazaar Co., Ltd. .. *Assessees*

v.

The Commissioner of Income-tax, Burma .. *Referring Officer*

Indian Income-tax Act (XI of 1922), Sec. 9—Bazaar of stalls let at daily rent—Annual value, ascertainment of—Owner, if entitled to claim deduction as hypothetical tenant—Proper mode of computation.

Under Sec. 9 (2) of the Income-tax Act the annual value of bazaar property consisting of a number of stalls let out daily at a small rental is not to be determined on the basis of the owner deemed entitled to certain special deductions as a hypothetical tenant taking a lease of the premises for profit.

If the daily rent for which the stalls might reasonably be expected to let multiplied by the number of days in the year would fairly represent the sum for which the property might reasonably be expected to let from year to year to a prospective tenant the aggregate of such sums is the annual value subject to the deductions allowable under section 9 (1) of the Act. The question is one of fact to be determined by the Income-tax Officer.

Case [Civil Reference No. 4 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma for the opinion of the High Court.

CASE.

The following question is referred to the High Court under section 66 (2) of the Indian Income-tax Act, 1922, at the instance of the Suratee Bara Bazaar Coy., Ltd., (hereinafter called the Company). The application arises out of the assessment to income-tax for the year 1928-29. The part of the Company's income which is the subject of the reference is the income from the bazaars. These bazaars consist of stalls or shops which are let out to tenants on the basis of a daily rent. The question which I am asked to refer is as follows:—"In respect of income from the petitioner's bazaar properties should the Income-tax Officer have adopted the principles laid down in the case of *The Suratee Bara Bazaar Co., Ltd. v. The Municipal Corporation of Rangoon,* 5 Rang. 715 and having arrived at the annual value in accordance with such principles should he have deducted therefrom the allowances referred to in section 9 of the Act?"

2. The assessment of the income from the bazaars was made in conformity with the terms of section 9 of the Income-tax Act. Section 9 (1) enacts "The tax shall be payable by an assessee under the head 'Property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purpose of his business, subject to the following allowances, . . ." . Seven classes of allowances are specified. "Annual value" is defined in sub-section (2) as "the sum for which the property might reasonably be expected to let from year to year."

The method of determining the taxable income from the bazaar property which finally has been adopted by the Department is as follows:—

The rents paid by the shopkeepers include elements which are not of the nature of rent but are either payment to the Company for services rendered, or for a commodity supplied, (e.g., for cleaning and electric light) or re-payment to the Company of money paid out by it on behalf of the tenant (e.g., tenant's taxes). These extraneous elements have been eliminated by deduction.

Taking the part of the rents paid by the tenants which are of the nature of pure rent (in the sense of the money paid by the tenant for the use of the property), the annual value of the bazaars as a whole has been taken as the sum of the annual values of the separate stalls, the annual value of each stall being taken as 365 times the daily rent. From the annual value so determined the allowances prescribed by clauses (i) to (vii) of section 9 (1) of the Act have been deducted, viz.—(a) One-sixth of "annual value" for repairs, (b) ground rent, (c) land revenue, (d) collection charges, (e) vacancies.

3. The Company's claim in the present reference is based on the two cases: *The Suratee Bara Bazaar Coy., Ltd., vs. The Municipal Corporation of Rangoon.*[1] In these two cases the Honourable Judges of the High Court accepting the method followed in practice by the Municipal authorities in determining the annual value of the bazaar properties, proceeded to determine what allowances should be made for the Municipal assessment. Mr. Leach for the Company claims that for income-tax purposes the Company is entitled, in computing its income from the bazaars, to calculate the "*bona fide* annual value" in the manner approved by the High Court for the municipal assessment, and then to proceed to deduct therefrom all the allowances permitted by clauses (i) to (vii) of section 9 (1). The Income-tax Officer has begun by taking the gross annual rental that might be expected to be received. From that he has made deductions, in accordance with the provisions of section 9 (1), for repairs, for taxes, for land revenue, for cost of collection, and for vacancies. The contention of the Company is that the Income-tax Officer should have begun with the gross annual rental that might be expected to be received and from that have deducted, in order to ascertain the rent that a hypothetical tenant would pay, the allowances approved by the High Court for the municipal assessment, viz.,—(a) allowances for vacancies, bad debts, etc., (b) cost of collection expenses, etc., (c) taxation, (d) a fair profit for the hypothetical tenant, (e) interest on the capital required by the hypothetical tenant. From the amount so reduced—such is the contention—the Income-tax Officer should have proceeded to make all the deductions allowed by section 9 (1) of the Income-tax Act which in this case are as follows: repairs, taxes, land revenue, cost of collection, allowance for vacancies. This method would have, from the Company's point of view, the pleasing result that the Company would be allowed to deduct twice over from the total gross rent it might be expected to receive the allowance for vacancies, for cost of collecting rents, for land revenue. The Company would, in short, be allowed to deduct from the total gross rent that might be expected all the deductions allowed to the hypothetical tenant in the municipal assessment as well as all the deductions which section 9 (1) of the Income-tax Act allows to the landlord.

4. In my opinion the Company's contention is wrong and the answer to the question referred should be in the negative.

5. One ground for my opinion is that it is a thoroughly unsound principle to import into the interpretation of one Act conclusions based on the meaning which a common term bears in another Act, when the common term has demonstrably not the same meaning in both Acts. In the Income-tax Act the term "annual value" is defined as being the sum for which the property might reasonably be expected to let from year to year. Before this value is made the basis of assessment, certain specified deductions are made. The definition in section 80 of the Rangoon Municipal Act is practically identical with that in the Income-tax Act. The only legally authorised deduction from the gross annual rent which I can find in this Act is in section 3 (2) of Chapter II of Schedule III. This specific deduction in determining the "annual value" for the purpose of the Municipal Act is sufficient to establish that the term "annual value" as used in the Rangoon Municipal Act has a connotation which is valid for that Act only.

6. But apart from this general consideration, purely legal grounds can be given for holding the Company's contention to be wrong. The first ground is that the method of determining the annual value of a property

(1) 3 Bur. L. J. 221 and 5 Rang. 715.

actually divided up into portions which are let to separate tenants for short periods, as the amount which a hypothetical middleman, who intended to sub-let the several portions to sub-tenants, would give for a year's lease, is not admissible for income-tax purposes. I rely on *Williams v. Sanders.*[1] and *Embleton v. Norwich Union Life Insurance Society.*[2]

I go further than this. After studying the leading English authority Ryde on Rating and consulting all the British rulings I can trace, I can find no authority whatever for the view that, in the case of a building consisting of several portions let out to separate tenants, the annual value is the rent that would be paid by an hypothetical tenant who hired the whole building with a view to letting out the several portions to several sub-tenants. The conception of an "hypothetical tenant" is discussed at page 203 sqq of Ryde on Rating. A perusal of this passage makes it clear that the term "hypothetical tenant" is used in the sense of hypothetical occupier. There is no authority whatever for taking it in the sense of an hypothetical middleman.

In the case *Attorney-General v. The Mutual Tontine Westminster Chambers Association (Ltd.)*[3] it was held, *inter alia*, that in the case of a block of flats and offices the house-duty on each block was rightly charged on the aggregate of the sums at which its component tenements were estimated in the valuation list. In that case it was argued by the appellants that the letting value of the block as a whole should be adopted as the basis for assessment. But the Judges did not accept that contention.

The claim that, in the case of a building let in portions, the annual value should be estimated on the basis of what an hypothetical middleman would be willing to pay, was never, so far as I can ascertain, put forward directly again in the United Kingdom until the case of *Williams v. Sanders.* At any rate, the reported cases cited by both sides in that case contain only very indirect support of the respective contentions. Mr. Justice Rowlatt had to go back to the *Mutual Tontine Westminster* case which dates from 1876, for support for his conclusion. The opposite contention had apparently been dead for over fifty years.

7. Another reason for holding that the Company's contention is wrong is that there are decisions of the Indian High Courts which rule out entirely the whole idea of invoking the hypothetical middleman. In the municipal cases quoted above the Honourable Judges were concerned with determining the pure rent of the Bazaar buildings. With this end in view the conception of the hypothetical middleman was introduced. The total amount which such a middleman might be expected to get from the sub-tenants (omitting the portion, such as payment for services, etc., which is not material to the present quesion) is conceived as falling into two categories:—(a) the pure or intrinsic rent of the bazaars; (b) a return to the middleman for his activities in administering the bazaars. The hypothetical middleman is conceived as running the business of administering the bazaars. This is explicitly stated in a passage quoted in the second judgment from the first judgment:—"(d) He would then have to consider how much actual profit he would expect to put into his own pockets to reward him for the trouble of managing the business and incurring the risk of loss, which is inseparable from all business transactions."

It is to be noted that the classes of expenditure of those allowed by the High Court in the municipal assessment which are not allowed in the calculation of the income for the income-tax assessment are those which

(1) 11 Tax Cas. 673 (2) 11 Tax Cas. 681 (3) L. R. I. Ex. D. 469

arise from the idea that the hypothetical middleman is running the business of administering the bazaar. They are—(a) remuneration of middleman; (b) interest on capital; (c) profit. Now in actual fact there is no middleman. The Company administers its own bazaars. And, in view of the decisions of Indian High Courts, it is entirely inadmissible to import into the Company's assessment to income-tax the conception that in administering its bazaars it is carrying on business. In the case of *The Kaladan Suratee Bazaar Coy., Ltd.* and *Suratee Bara Bazaar Coy., Ltd.*[1] the Chief Court held that this self-same Bazaar Company was not conducting a business and was not assessable as such, but was assessable, under the relevant provisions of the law, as owners of property. The actual case was under the Excess Profits Duty Act and that Act was linked up with the Income-tax Act of 1918. But all the relevant sections of the law as it then was, are identical with those of the present Income-tax Act. The view taken by the Chief Court in the case quoted has recently been endorsed by the Calcutta High Court in the case of *The Commercial Properties Ltd. v. The Commissioner of Income-tax, Bengal*[2]

Leach, for the Assessees.

Eggar, for the Crown.

JUDGMENT.

PAGE C. J. :—The following question has been stated for the decision of the High Court by the Commissioner of Income-tax, Burma:—"In respect of income from the petitioner's bazaar properties should the Income-tax Officer have adopted the principles laid down in the case of *The Suratee Bara Bazaar Co., Ltd., v. The Municipal Corporation of Rangoon*, 5 Rang. 715, and having arrived at the annual value in accordance with such principles should he have deducted therefrom the allowances referred to in section 9 of the Act?" Now, it is common ground that the assessment of these properties was rightly made under section 9 of the Income-tax Act (XI of 1922) *The Commercial Properties, Ltd., v. The Commissioner of Income-tax, Bengal.*[2]

The contention on behalf of the assessee, having regard to the provisions of section 9, is that in ascertaining the "annual value" of the property subject to assessment under section 9 (2), upon a true construction of that sub-section it was incumbent upon the Income-tax Officer to treat the assessee, who is the owner of the property, as though he were a tenant of the property, and, if that were done, he as a hypothetical tenant would be entitled to certain special deductions in arriving at the annual value of the property; for instance, a sum representing a fair profit to the assessee upon the hypothesis that he had taken a lease of the premises with the object of acquiring profit or gains therefrom, and a sum representing interest on the capital which it was to be presumed that a tenant would expend upon taking a lease of the property with a view thereby to make the lease that he had obtained profitable to him. Deductions of this description were granted to an assessee under the Rangoon Municipal Act in *The Suratee Bara Bazaar Coy. Ltd., v. The Municipal Corporation of Rangoon.*[2] The terms of that Act, however, are couched in language which is materially different from that which was used by the Government of India in enacting section 9 of the Income-tax Act, and in my opinion it would be idle to refer to the principles laid in connection with the Rangoon Municipal Act in *The Suratee Bara Bazaar Coy., Ltd.*, v. *The Municipal Corporation of Rangoon*, for guidance in construing the provisions of section 9 of the Income-tax Act. Sec-

(1) 1 I. T. C. 50 (2) 3 I. T. C. 23

tion 9 must be construed according to the terms of that section; and the only question that falls for determination on this reference is as to the meaning of the words "annual value" as defined in section 9 (2) of the Act. Section 9 (2) runs as follows:—"For the purposes of this section the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year." Whose property is it that is to be assessed? It is the property of the assessee.

Now, this property is bazaar property consisting of a number of stalls let out daily at a small rental, and we are satisfied that in circumstances such as those obtaining in the present case the annual value of each of the stalls must be ascertained, and that the annual value of the stalls taken in the aggregate is the property of the assessee liable to assessment. *Williams v. Sanders*;[3] see also *The Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd.*[4] If the contention urged on behalf of the assessee were to be accepted, namely, that although he is the owner of the property he is to be deemed to be a hypothetical tenant thereof for the purposes of section 9 (2), he would be entitled as a hypothetical tenant to make deductions such as we have indicated, and also deductions in respect of repairs, insurance, etc., which he would be entitled to deduct a second time under the provisions of section 9 from the annual value of the property after it had been ascertained. Not only would some of these deductions thus be granted twice over, but the deductions in respect of interest on capital and the profit which it is to be presumed that a tenant taking a lease of the bazaar would make, although in truth and fact these sums are part of the profit accruing to the assessee as the owner of the premises, in such circumstances would escape assessment. In my opinion the contention of the assessee is misconceived, and that on the facts as found there is no room for the doctrine of the "hypothetical tenant" to operate. The meaning and effect of section 9 appears to me to be quite plain. It is a section under which the owner of immovable property is assessed. What is the subject of assessment? The income and profits derived from the property. How are such income and profits to be ascertained? By finding out "the sum for which the property might reasonably be expected to let from year to year". How is that to be done? In our opinion by ascertaining the annual value of each of the stalls which in the aggregate make up the property to be assessed. In order to discover what that annual value is the Income-tax Officer must have regard to the facts connected with the property which are within his knowledge, and of which he has information. One of the factors that he must take into consideration is the actual daily rent obtained from the various stalls. If in his opinion the daily rent is sufficiently stable to enable him reasonably to determine that the rent as paid is the letting value of the stall per diem it was the duty of the Income-tax Officer to determine as a matter of fact that it was so. The Income-tax Officer has so found, and his finding cannot be challenged on this reference. It is only where the actual rent paid by the lessee is not a safe criterion of the letting value of the property that the Court is compelled to ascertain the sum for which the property might reasonably be expected to let from year to year by considering what prospective tenant would be prepared to pay as rent, taking into account the various matters in respect of which a deduction is allowed.

In the present case the Income-tax Officer has found as a fact that the daily rent paid in respect of each of the stalls was sufficiently stable to enable him to hold that the daily rents paid for the stalls were the sums for which the stalls might reasonably be expected to let *per diem*; and if, putting

(3) 11 Tax Cas. 673

(4) L. R. I. Ex. D. 469

himself in the position of a prospective tenant of each of the stalls, the Income-tax Officer comes to the conclusion that the daily rental multiplied by the number of days in the year would fairly represent the sum for which the property might reasonably be expected to let from year to year, then the aggregate of such sums is the annual value of the property within section 9 (2) of the Income-tax Act. *Prima facie* it would not appear probable, I think, that a prospective tenant of a stall for a year would be prepared to pay a rent for a whole year that is 365 times the rent that he would be willing to give for a single day or a few days, and we are not satisfied that the Income-tax Officer up till now has applied his mind to the question whether a stall that might "reasonably be expected to let" from day to day at a certain sum might also "reasonably be expected to let" at 365 times that sum from year to year. That is a question of fact to be determined by the Income-tax Officer and it will be necessary for him to reconsider the annual value of each of the stalls in the light of these observations; see *Williams* v. *Sanders*.[1] If the Income-tax Officer comes to the conclusion that the daily letting value multiplied by 365 is the sum at which the stalls might reasonably be expected to let from year to year, then the aggregate of those sums in respect of the stalls will be the annual value of the property to be assessed under section 9 of the Income-tax Act. If, on the other hand, upon a consideration of all the facts, he thinks that the sum for which each or any of the stalls is let *per diem* is not the sum for which the stall might reasonably be expected to let from year to year he must estimate as best he can the sum for which the stall "might reasonably be expected to let" from year to year. The aggregate of the sums so ascertained in respect of each of these stalls will be the annual value of the property to be assessed, and the assessee will be entitled to such deductions from the annual value as are allowed under section 9 (1).

The reference is answered in this sense. There will be no order as to costs.

DAS J.:—I agree.

MAUNG BA J.:—I agree.

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(433) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

[19th February, 1931.]

N. N. Burjorjee .. *Assessee*

v.

The Commissioner of Income-tax, Burma .. *Referring Officer*

Indian Income-tax Act (XI of 1922), Secs. 23 and 34—Original assessment proceedings, Time limit for—Completion within assessment year—Section 34, applicability of.

On the true construction of Sec. 34 of the Income-tax Act no time limit is fixed for all original or first assessments under Sec. 23 of the Act.

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1 11 Tax Cas. 673.

Section 34 does not apply to cases in which assessment proceedings duly commenced in the year of assessment have not been completed within that year.

Rajendra Narain Banja Deo *vs.* The Commissioner of Income-tax, Bihar and Orissa. 2 I. T. C. 82. *Applied.*

On a reference the Court is confined to consideration of the questions propounded for its determination in the order of reference by the Commissioner of Income-tax.

Case [Civil Reference No. 3 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma for the opinion of the High Court.

CASE.

The following case is referred to the High Court in accordance with the provisions of section 66 (2) of the Indian Income-tax Act, 1922.

2. The facts are as follows :—

For the 1927-28 assessment a notice under section 22 (2) of the Act calling for a return of income was issued on the 1st April 1927 to Mr. N. N. Burjorjee, Bar-at-Law, Rangoon, hereinafter called the assessee. Notices under section 22 (4) calling for accounts and under section 23 (2) for appearance were issued to the assessee on the 15th June 1927. No further notice was issued to the assessee until the 17th July 1930. On the 8th August 1930 the assessment order was passed. No question as to the correctness of the amount of the assessment has been raised.

3. The assessee appealed to the Assistant Commissioner who decided against him. A copy of the Assistant Commissioner's order is attached and marked A *. As the assessee is dissatisfied with the Assistant Commissioner's order he has asked me to refer to the High Court under section 66 (2) of the Act the following two questions of law arising out of that order:—

(1) Whether upon the true construction of section 34 of the Indian Income-tax Act, 1922, a time limit is fixed for all original or first assessments under section 23 of the Act and if the answer to this is in the affirmative whether such time limit is not one year ending with the last day of the year of assessment.

(2) Whether an assessment for any year can be made after the close of the year of assessment without any valid notice being issued to an assessee under section 34 of the Act?

I refer those two questions.

4. The procedure with regard to assessment is prescribed in sections 22 and 23 of the Act. The proceedings open with the issue of a notice under section 22 (2). Section 23 which deals more particularly with assessment and the computation of income contains nothing to indicate that the assessment order must be passed within a certain time.

The assessee says, however, that section 34 should be read with section 23 and that taken together they mean that an assessment must ordinarily be completed within the year of assessment and that if not completed by that time it can be completed later only if a notice under section 34 is issued. This contention is in my opinion based upon a wrong interpretation of the words "has escaped assessment" in section 34. Income which is

already the subject of assessment proceedings although these proceedings are not completed is not income which has escaped assessment and cannot be the subject of a notice under section 34.

My opinion on the first question therefore is that the answer to the first part is in the negative. The second part does not arise. My opinion on the second question is that an assessment for any year can be made after the close of the year of assessment without any valid notice being issued to an assessee under section 34 of the Act, provided that assessment proceedings have been started within the year of assessment by the issue of a valid notice under section 22 (2) calling for a return of income.

Foucar, for the Assessee.

Eggar, for the Crown.

JUDGMENT.

In our opinion this is a plain case.

On the 1st of April 1927 a notice was served upon the assessee under section 22 (2) of the Income-tax Act calling upon him to make a return of income as therein provided for the year of assessment 1927-28 in respect of the income received in the previous year. On the 15th of June 1927 further notices were served upon the assessee under sections 22 (4) and 23 (2) of the Act. It does not appear that any further steps were taken in the matter by the Income-tax authorities until the 17th July 1930, when a further notice under section 23 (2) was served upon the assessee. In due course an assessment was made on the 8th of August 1930, and the correctness of the amount of the assessment has not been challenged. The assessee appealed against the order of assessment to the Assistant Commissioner, but his appeal was dismissed. On the application of the assessee the Commissioner of Income-tax under section 66 (2) of the Act has referred for the decision of the High Court the following questions of law arising out of the order of the Assistant Commissioner:—

(1) Whether upon the true construction of section 34 of the Indian Income-tax Act, 1922, a time limit is fixed for all original or first assessments under section 23 of the Act and if the answer to this is in the affirmative whether such time limit is not one year ending with the last day of the year of assessment?

(2) Whether an assessment for any year can be made after the close of the year of assessment without any valid notice being issued to an assessee under section 34 of the Act?

Section 34 runs as follows:—"If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section; Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

Now, the question that falls for determination is, what is the meaning of the words "escaped assessment" in section 34. On behalf of the assessee it is contended that assessment proceedings, at any rate up to the stage at which the order of assessment is passed under section 23 (4), must be completed before the end of the year of assessment, i.e., the year in which the tax is payable, and that otherwise the assessment proceedings *ipso facto* abate. In our opinion this contention is unwarrantable, and cannot be accepted.

We are of opinon that section 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year, but some portion of the income, profits or gains of such assessee for some reason or other has not been included in the order of assessment. Such income is income which has "escaped assessment" in the year, and falls within the ambit of section 34 of the Act. Sec-34 does not apply to cases in which assessment proceedings have duly been commenced in the course of the year of assessment, although it may be that they have not been completed within that year.

The view that we take is supported by certain observations of Dawson Miller C. J., in *Raja Rajendra Narayan Bhanja Deo of Kanika v. The Commissioner of Income-tax, Bihar and Orissa.* [1] His Lordship observed:— "It is quite possible that in certain cases no demand could be made within the actual year for which the tax is payable. Provision is made for disputes which may arise as to the acceptance or rejection of the assessee's return. If his return is not accepted then an enquiry takes place, evidence may be demanded of him, and much time may be expended in carrying on the enquiry, and it is quite possible that such enquiry would not terminate until after the year of assessment, and I do not think that it can be suggested that because the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, it is tantamount to an enactment that it cannot be issued afterwards."

An argument has been presented on behalf of the assessee with a view to establish that there must be a time limit within which the order of assessment must be made under section 23 of the Act. We decline to consider such an argument upon this reference, for the Court is confined to a consideration of the questions propounded for its determination in the order of reference by the Commissioner of Income-tax.

For the reasons that we have stated we are of opinion that the answer to the first question set out in the order of reference is in the negative. The second question does not arise. Cost 6 gold mohurs.

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(434) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

(26th February, 1931.)

Gulab Chand Choteylal and others. .. *Assessees*

v.

The Commissioner of Income-tax, United Provinces.

Indian Income-tax Act (XI of 1922), Secs. 66 (3) and 67 (A)—Commissioner refusing reference—Application to Court, computation of limitation for—Orders of Assistant Commissioner and Income-tax Officer, time for obtaining copies of, if deductable.

(1) 2 I. T. C. 82

The words "such order" in Sec. 67—A of the Income-tax Act with reference to an application under Sec. 66 (3) refer to the order of the Commissioner of Income-tax refusing to state a case and not to the orders of the Income-tax Officer and the Assistant Commissioner required to be produced by the applicant under Rule 1 of the Income-tax Rules framed by the Allahabad High Court.

Application [Miscellaneous Case No. 649 of 1930] made under section 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, United Provinces to state a case for the opinion of the High Court.

JUDGMENT.

This is an application by an assessee to the High Court asking that the Commissioner of Income-tax should be required to state a case under section 66 of the Income-tax Act. The learned Government advocate has taken a preliminary objection that the application is time-barred.. Section 66 (3), Income-tax Act states, "If on any application being made under sub-section (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may within six months from the date on which he is served with notice of the refusal, apply to the High Court."

Now it is admitted that the Commissioner refused to state a case on 19th April 1930 and that the notice of refusal was communicated to the assessee on 3rd May 1930. The application to the High Court was made on 12th November 1930 and was not accompanied by any copies of the order of the Commissioner or of the Assistant Commissioner or of the Income-tax Officer. Under section 67—A "In computing the period of limitation prescribed for an appeal under this Act or for an application under section 66, the day on which the order complained of was made, and the time required for obtaining a copy of such order shall be excluded".

It is admitted that application for a copy of the order of the Income-tax Commissioner was not made until 22nd November 1930, that is, after the application under section 66 (3) was filed in this Court. Accordingly, the period for obtaining a copy of the order of the Commissioner cannot be applied to extend the period of limitation. But it is contended that two other periods should be used for extension of limitation, namely from the 26th to the 29th of May 1930, a period of four days occupied in obtaining a copy of the order of the Income-tax Officer, and from the 14th to the 18th of March 1930, a period of five days, in obtaining a copy of the order of the Assistant Commissioner on appeal. If these two periods of 9 days in all were added, it is true that the application to this Court would be within time. The question therefore is whether any rule exists under which these two periods can be used to extend the period of limitation. Section 67—A of the Income-tax Act refers merely to the time required for obtaining a copy of "such order", that is, for the order which is the subject of a reference under section 66 (3). Accordingly, it is clear that this section does not authorise the extension of the period of limitation by the time required for obtaining the other two orders in question.

Reference was also made to the Limitation Act, section 12, but that does not apply to a proceeding under section 66 (3) of the Indian Income-tax Act. It was also argued by learned counsel that there would be some analogy between the case of a second appeal being filed in the High Court under the Civil Procedure Code. If that be so, then the analogy is unfortunate for the applicant, because it has been held by a Full Bench of this Court in *Nar-*

singh Sahai v. Sheo Prasad[1] that although a rule of this Court with reference to the presentation of an appeal from an appellate decree required that the memorandum of appeal should be accompanied not only by a copy of the decree or order, but where it exists a copy of the judgment of the Court of first instance still this rule did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal, the time requisite for obtaining a copy of the judgment of the Court of first instance.

It is a fact that within the rules framed for procedure of this Court in regard to Income-tax reference, rule 1 states that where an application is made under section 66 (3) of the Income-tax Act, there should be copies of the order of the Income-tax Officer, the Assistant Commissioner of Income-tax and the Commissioner of Income-tax disposing of the case. But the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining orders other than those of the Commissioner of Income-tax under reference.

Under these circumstances, we consider that this application is time-barred and we therefore dismiss it with costs. We assess the fee of the Government Advocate at Rs. 100 and allow him one month for the filing of the certificate.

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(435) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

(26th February, 1931.)

Hari Krishna Das .. *Assessee*

v.

The Commissioner of Income-tax, U. P. .. *Referring Officer*

Indian Income-tax Act (XI of 1922), Secs. 31 (3) (d), 28 and 23—Appeal against assessment and penalty—Assistant Commissioner, jurisdiction to enhance penalty.

Under Sec. 31 (3) (d) of the Income-tax Act, the Assistant Commissioner of Income-tax hearing an appeal against an assessment and penalty imposed under Sec. 28 of the Act, has no authority in law to enhance the penalty.

Case [Miscellaneous Case No. 590 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

CASE.

1. The assessee is a Hindu undivided family owning the firm of Vaishnav Das Jiwan Das and represented by Rai Sahib Harkrishna Das.

2. The assessee has filed a petition under section 66 (2) requesting that certain points be referred to the High Court. (Vide Appendix A *)

3. For the year 1929-30 the assessee filed a return under section 22 (2) disclosing a total income of Rs. 12,837-13-3 in the previous year (Dewali Samvat 1984 to Dewali Samvat 1985). If this return had been accepted as correct, the assessee would have been assessed to a tax of Rs. 530-8-0 (exclusive of dividends taxed at source.)

(1) I. L. R. 40 All. 1

* Not printed.

4. Enquiry, however, revealed that the income had been grossly understated, and the Income-tax Officer on February, 5 1930, found the income to have been Rs. 90,471. On this amount he assessed the assessee to a tax of Rs. 8,317-8-0 (again exclusive of dividends taxed at source) and to super-tax Rs. 965-15-0.

5. Thus the amounts of tax and super-tax which would have been avoided if the income returned by the assessee had been accepted as the correct income were, respectively, Rs. 7,787 and Rs. 965-15-0.

6. Acting under section 28 the Income-tax Officer imposed a penalty of Rs. 1,000 in his assessment order.

7. The assessee appealed to the Assistant Commissioner against the assessment and against the penalty imposed.

8. The Assistant Commissioner on April 19, 1930, upheld the assessment. Simultaneously, after issuing notice to the assessee to show cause why the penalty under section 28 should not be enhanced, the Assistant Commissioner raised the penalty from Rs. 1,000 to Rs. 5,000. A copy of the notice issued will be found in Appendix F. *

9. The assessee then appealed to the Commissioner against the enhancement of the penalty, adding that if the Assistant Commissioner's order were held not to be appealable, a reference might be made to the High Court. The Commissioner admitted the appeal and dismissed it on August 5, 1930, informing the assessee that if he desired that a reference be made to the High Court, a fresh application must be presented. Accordingly the assessee presented the petition mentioned in paragraph 2.

10. A copy of the Income-tax Officer's assessment order will be found in Appendix B, * copies of the two orders passed by the Assistant Commissioner in appeal in Appendices C * and D *, and a copy of the Commissioner's appellate order in Appendix E *

11. The assessee has set forth what he claims to be six points of law, but in the opinion of the Commissioner the first five points raise only a single question of law, that question being "Whether when a penalty has been imposed under section 28 by the Income-tax Officer, and an appeal has been filed against the imposition of the penalty, the Assistant Commissioner having regard to the wording of section 31 (i) (d) has power to enhance the penalty."

12. The sixth point challenges the validity of the Assistant Commissioner's finding that the assessee had concealed particulars of his income. The question of law which arises may be stated thus:—"Whether the Assistant Commissioner's finding that the assessee had concealed his income was based on evidence."

13. In the fifth paragraph of his petition the assessee raises a question of law which it is useless to refer to the High Court. It is the question whether an appeal lay to the Commissioner against the Assistant Commissioner's order enhancing the penalty under section 28; but the assessee was not prejudiced by the Commissioner's view that an appeal lay, and would not benefit thereby if that view were now held to be incorrect.

14. In the opinion of the Commissioner the answers to the questions stated in paragraphs 11 and 12 are in the affirmative.

* Not printed.

JUDGMENT.

The learned Commissioner of Income-tax has stated a case at the instance of one Rai Sahib Har Krishna Das under the following circumstances:

The firm Vaishnav Das Jiwan Das of which Rai Sahib Har Krishna Das is the head has been assessed to an enhanced assessment and was made to pay a penalty of Rs. 1,000 by the Income-tax Officer. It appears that a return was made which was found to be inadequate. The return shows an income of Rs. 12,000 and odd while it was later found that the income was Rs. 90,000 and odd. Thereupon the Income-tax Officer made an assessment of Rs. 8,000 and odd as income-tax and Rs. 900 and odd as super-tax. In addition to this enhanced taxation a penalty of Rs. 1,000 was imposed. The firm appealed against the assessment to the Assistant Commissioner of Income-tax and that learned Officer dismissed the appeal so far as the assessment was concerned, but increased the penalty to a sum of Rs. 5,000. The penalty under the law, namely Sec. 28 of the Indian Income-tax Act, could have been imposed to the maximum amount of assessment namely Rs. 8,000 and odd. The amount of penalty imposed by the Assistant Commissioner was therefore within the limit.

A further appeal was taken to the Commissioner and it was contended before him that the Assistant Commissioner was not authorised in law to enhance the penalty.

In the case stated, two questions have been formulated and the first question that we have to answer is "whether when a penalty has been imposed under Sec. 28 by the Income-tax Officer, and an appeal has been filed against the imposition of the penalty, the Assistant Commissioner having regard to the wording of Sec. 31 (i) (d) has power to enhance the penalty?" (The figures and letters "31 (i) (d)" in the order of the Commissioner of Income-tax are, we take it, a slip for the figures and letters, 31 (3) (d).)

The argument in favour of the assessee is as follows: In section 31 sub-section (3) clause (a) provision has been made for enhancement of assessment. When this provision for enhancement has been made the clear word of 'enhancement' has been used. Again, in the last clause of Sec. 31 the provision has been made that no enhancement of assessment shall be made until the assessee has had a reasonable opportunity of showing cause against such an enhancement. We do not find in the case of enhancement of penalty any similar provision of hearing the assessee. It is argued that the legislature, if it had meant to authorise the Assistant Commissioner to enhance the penalty, would have also provided for hearing the assessee before the penalty was raised. It is further argued that where an assessment is enhanced by the Assistant Commissioner hearing an appeal, a further appeal is provided for under Sec. 32 of the Act, but no such appeal is provided for in the case of enhancement of penalty, if such penalty could be enhanced by the Assistant Commissioner on appeal. Another argument has been based on the language of the Civil Procedure Code, Schedule 1, Order 41 R. 31. We do not propose to consider this last mentioned argument, because we cannot really read one Act by the help of another Act.

On behalf of the Commissioner, the learned Government Advocate has urged that the powers of the Assistant Commissioner hearing an appeal are defined by the words, "affirm, cancel or vary". He argued and with great deal of force that the word "vary" would mean both "reduce and enhance".

We have to choose between these two alternative arguments.

Before we read the language of the sections 31 and 32 again we might state as a matter of general principle, that a penalty is not, as a rule to be enhanced in appeal by mere implication of language. When a person is made subject to a penalty and a right of appeal is given, he appeals in the hope that he would be able to have his sentence or punishment reduced. Where the appellate authority is given a power to enhance that penalty, one would expect that that power would be given to that authority in clear language. We can recall the provisions in the Criminal Procedure Code, not the language of the Criminal Procedure Code, but the principles on which the provisions are founded. The exceptional power of enhancing a sentence in a criminal case is given to the High Court and that too on hearing the convicted person. Ordinarily when an appeal is filed before a Sessions Judge or before the High Court, the Code provides for altering the sentence, but takes care to say that the alteration should not amount to enhancement. It is only in the exercise of its revisional power that the High Court could enhance the sentence. As we have said it is a very exceptional power given to the High Court.

We find that the section 31 is not oblivious of the fact that there is the word enhance or enhancement in the English language and does not fail to use it when the idea was that the assessment should be enhanced. If we see that the legislature has not used that word enhance or enhancement while dealing with a case of penalty, we can easily say that some different intention was intended to be conveyed. It is true that the word 'vary' has been used in conjunction with the word 'order' in clause (d) of sub-section 3 of section 31. But the idea could have been easily expressed by altering the sentence and using the unambiguous word "enhance" with respect to penalty. The fact that no provision was made for hearing the assessee before enhancing the penalty is a clear argument in support of the contention of the counsel for the assessee. The fact again that a further appeal is provided for in the case of an enhancement of assessment but no further appeal is provided for in the case of an enhancement of penalty is another argument against the view that a penalty could be enhanced

Section 28, last paragraph of sub-section 1 provides that where a penalty is imposed, there shall be no prosecution for an offence committed relating to income-tax. This shows that a choice lay between prosecution and imposition of penalty. The penalty must therefore be in the nature of a fine imposed by a criminal court.

The Income-tax Act is a fiscal enactment and in the case of an ambiguity, it is to be construed by the well-known principle in favour of the subject and not against the subject. At best the word "vary" used shortly after the word "enhance" in the same section is not conclusive of the idea that the penalty may be enhanced. In the case of an ambiguity the Act will have to be construed in favour of the subject and not in favour of the Crown.

We notice that no provision is to be found within the four corners of the Indian Income-tax Act by which the Department may ask by way of an appeal, any authority to enhance a penalty which has been imposed by the Income-tax Officer. This shows that if the assessee decides not to file an appeal against an order imposing penalty, the Department cannot seek to have the penalty enhanced. It was therefore not likely that the legislature meant that an opportunity might be taken of an appeal to enhance the penalty.

For all these reasons we are of opinion that the Assistant Commissioner had no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under Sec. 28 of the Income-tax Act.

This is our answer to the first question. The second question must be answered in the affirmative as the learned counsel for the assessee has agreed that that must be the answer to be given to that question.

We direct that a copy of this judgment under the seal of the Court be sent to the Commissioner of Income-tax and that the assessee should have his costs of this reference. We assess the Government's Advocate's fee at Rs. 200 and direct him to file his certificate of fees within a month. The fees of the counsel for the successful assessee will also be taxed at Rs. 200.

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(436) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Harrison and Mr. Justice Tek Chand.

(26th February, 1931.)

Mahommad Naqi .. *Assessee*

v.

The Commissioner of Income-tax,
Punjab and N. W. F. Provinces. .. *Referring Officer*

Indian Income-tax Act (XI of 1922) Secs. 9 and 24—Unrealised rent bona fide *given up by landlord—Assessability—Set off as loss, if permissible—Scope of Sec. 24.*

Where a landlord in a suit instituted against his defaulting tenant for arrears of rent and possession of the leased premises bona fide *gave up the whole of the rent claim to get rid of his impecunious tenant, the unrecovered rent cannot be taken up into account as the assessable income of the landlord who is entitled to set it off under Sec. 24 of the Income-tax Act as loss against income under the same head.*

Under Sec. 24 loss under one head can be set off against income, profit or gains under the same head and in cases where it more than counterbalances the whole of the profits under that head, to carry it over to another head for obtaining full relief under the section.

Case [Civil Reference No. 23 of 1930] stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces in compliance with the order of the High Court dated 1st April 1930.

CASE.

By an order dated 1-4-1930 passed under Sec. 66 (3) of the Income-tax Act, XI of 1922, I am required to state and refer to the High Court, a case arising out of the assessment of the petitioner, Khan Sahib Sh. Muhammad Naqi, a house-owner of Lahore, for the year 1927-28 on the following

question of law, which has been formulated by the Hon'ble Judges, viz., "Is the amount of the rent of a certain property, which was occupied by a tenant, who in spite of the efforts of the assessee (landlord) persisted in making a default and which (amount) the landlord in a subsequent litigation had to forego in order to secure the eviction of the tenant liable to be taken into account as the income of the assessee in arriving at the total sum on which the assessment is to be made?"

2. **Facts of the case.** In connection with the assessment for the year 1927-28, the assessee claimed against his income from house property a deduction of Rs. 35,333 representing unrealised rent of the property at Lahore, known as the Grand Hotel. The facts relating to this claim are that one Mrs. O'Gorman occupied this property and did not pay the rent. The amount claimed as a deduction is composed of Rs. 30,000 being the rent due for 1925-26 and Rs. 5,333 due for the following year upto 4-6-1926. The petitioner was apparently unable to recover these arrears because of a compromise which he had accepted before the High Court in May 1926, as a result of which he had foregone his right to recover his rent. The Income-tax Officer declined to allow a set off on the ground that Sec. 9 of the Act did not provide for a deduction for unrealised portions of rent. The case was taken in appeal and the assessee urged that the amount in question should not have been included in the assessment under the provisions of Sec. 4 (1) of the Act, and in the alternative asked that it should be considered to represent vacancies and the amount allowed under Sec. 9 (i) (vii) of the Act. The appellate authority held that property was assessable to tax in accordance with the provisions of Sec. 9 and no allowances other than those provided for in the section could be given. In regard to the alternative request it was held that the property in question did not in fact remain vacant and that the request to treat the unrealised rent as vacancies was untenable. The petitioner then approached the Commissioner of Income-tax with two applications, one under Sec. 33 and another under Sec. 66 (2). The former was rejected by an order dated 8-9-1928 and a copy of it was sent to the petitioner with an intimation that his application under Sec. 66 (2) was time-barred, and he was asked whether in the circumstances he wished to withdraw that application, failing which it would have to be rejected. No reply was received to this communication, but the assessee submitted an application under Sec. 66 (3) to the High Court. That application came up for hearing before the High Court, on 28-3-1930 and a preliminary objection was raised by counsel for the Income-tax Department that the application under Sec. 66 (2) was time-barred and that the High Court could not entertain it. The High Court however held that it was within time. On the same day on which the application under Sec. 66 (3) was heard, i.e., on 28-3-1930, I received an application from the counsel for the petitioner, in which it was stated that counsel for the Department raised an objection before the High Court that no final order rejecting the application under Sec. 66 (2) had been passed after the petitioner had been given an opportunity of withdrawing the petition and that he did not wish to withdraw it, and I was asked to pass early orders on the petition. The petition was accordingly disposed of by me on the 29th March, 1930 it being held that it was time-barred and that therefore the question which the petitioner asked to be referred to the High Court could not be referred. In this connection, I would with the utmost deference submit that the application was not, as stated in the High Court's order dated 1-4-1930 rejected on the ground that no question of law arose, as will be seen from my order dated 29-3-1930, a copy of which is attached as Appendix A. *

* Not printed

3. Opinion of the Commissioner. It is of paramount importance to observe in this connection, and I venture to hope that in doing so I shall not be guilty of transgressing any canon of law or procedure, that Sec. 66 (3) only permits an assessee to approach the High Court if the Commissioner refuses to state the case on the ground that no question of law arises. Since that was not the ground for refusal to refer the case, it is, I submit with the utmost deference, a matter for primary consideration whether the petition is in the circumstances sustainable. With this observation I proceed to state the case, as ordered. Now Sec. 4 prescribes that the Act shall apply to all income, profits or gains, as described or comprised in Sec. 6 from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of the Act to accrue or arise or to be received in British India. It is important to note that the Act applies not only to income which actually accrues or arises or is received, but also to income which is deemed under the Act to accrue or arise or be received. Sec. 6 includes property as one of the heads which shall be charged to income-tax in the manner hereinafter appearing. Sec. 9 (1) prescribes the manner in which the tax shall be payable under the head "property". It says that the tax shall be payable in respect of the *bona fide* annual value of property of which the assessee is the owner, subject to certain allowances. By section 9 (2) the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year.

Now it seems to me perfectly clear that whether income corresponding to the *bona fide* annual value of property has actually accrued or arisen or been received or not, it is definitely deemed by Sec. 9 to accrue, or arise or be received since that section imposes the tax not on the actual amount of the rent for which the property is let, nor on the actual amount which has been received, but on a notional or conventional figure, namely, the *bona fide* annual letting value. Thus when residential property is occupied by the owner for his private purposes the tax is still payable on the annual value, although in common parlance it might be said that the amount represents income which has neither accrued or arisen nor been received. In the petitioner's case the income which has been taxed did accrue or arise, although admittedly it was not received. It accrued to him because he had a right to receive it. The fact that subsequently by a compromise he did in fact forego that right does not affect the fact that that right previously existed, or in other words that the income did accrue in the ordinary sense of the word.

It is however unnecessary to rely on this point, since it is perfectly clear from the scheme of the Act that the annual value of property, even if it does not accrue in the ordinary sense of the term, is deemed by the Act to accrue and is therefore taxable by the clear provisions of Sec. 9. The only allowances which are admissible deductions from the *bona fide* annual letting value are those enumerated in clauses (i) to (vii) of Sec. 9 (1). There is no provision in the section for allowing any unrealised rent or rent which an assessee chooses for any reason whatever to forego, and the Income-tax Officer had no discretion to make any allowance beyond those provided by law, when it was admitted that the property had been occupied during the whole of the accounting period. It is true that by a Notification No. 30 dated 30-11-1929 issued in exercise of the powers conferred by Sec. 60 of the Indian Income-tax Act, (XI of 1922) the Governor-General-in-Council has been pleased to exempt from tax, subject to the conditions specified therein, such part of the income in respect of which the tax is payable under the head property as is equal to the amount of rent payable but not paid by

a tenant of the assessee, but that notification cannot have retrospective effect, and therefore does not apply to the case under consideration. For the foregoing reasons I am of opinion that the question is only capable of one answer and that answer in the affirmative.

Fakir Chand and *Prakash Chandra*, for the Assessee.

R. C. Soni and *J. N. Aggarwal*, for the Crown.

JUDGMENT.

HARRISON J.:—The following question has been referred by the Commissioner of Income-tax in accordance with the directions issued by a Bench of this Court.:—"Is the amount of the rent of a certain property, which was occupied by a tenant, who in spite of the efforts of the assessee (landlord) persisted in making default and which (amount) the landlord in a subsequent litigation had to forego in order to secure the evidence of the tenants, liable to be taken into account as the income of the assessee in arriving at the total sum on which the assessment is to be made?"

The facts are that the assessee Khan Sahib Sheikh Muhammad Naqi is an owner of house property in Lahore and has no source of income beyond the rents which he receives for those houses. In the financial year 1925-26 he let a building known as the Grand Hotel to a Miss O'Gorman. She paid him no rent during the year 1925-26 nor upto 4th of June 1926. He brought a suit against her which failed on a technical point. While the appeal to the High Court was pending he realised that even if he succeeded and secured a favourable decision on the merits he had little or no hope of recovering anything. He, therefore, compromised his claim, the terms being that he should forego the whole of the Rs. 35,333 due to him and that the impecunious tenant should vacate the premises. He now claims the deduction of Rs. 35,333, the rent thus lost, which has been disallowed by the Commissioner, and the point referred is whether he is entitled to it or not.

It is conceded that he has acted fairly and honestly. There is no question of any collusion, and it is further conceded that it was good management on his part to get rid of the tenant and forego the rent. Now, under the Act income chargeable to income-tax is divided under six heads, one of which is "property" meaning in most cases "house property" as profits from agricultural land paying land revenue are exempt. Section 6 provides that tax is chargeable "in the manner hereinafter provided", and there is a wide difference between this manner as provided for the various heads and more especially for property as opposed to business. The income from property is not defined as the actual amount realised by the landlord. There are obvious reasons why this should be so and the income chargeable is the *bona fide* "annual value" of the property, irrespective of whether the property has brought in more or less. On this "annual value" income-tax has to be paid subject to certain allowances, for instance, repairs, collection charges, etc. One of these allowances is described as "vacancies", and counsel has urged that where an impecunious tenant fails to pay the rent the house should be treated as not having been let at all. This is obviously impossible, for "vacancy" cannot mean or include "occupation". Nor can unrealised or unrealisable rent be treated as rent, which did not accrue.

By Notification No. 30, dated 30th November 1929 the Governor-General-in-Council exempted the amount of rent payable but not paid by a tenant and a very necessary provision of the English Income-tax Act was thus introduced. This shows that it was necessary in the opinion of the Government to set at rest the doubt which existed as to the exact meaning

of the wording of the Act on this point. The question remains whether under the Act as it stood previous to the notification a landlord must pay tax on income not received by him through no fault of his own? If section 9 be exhaustive and the only reductions possible be the allowances there detailed, he must. The only remaining possibility is to give him relief under Section 24. This deals with loss as opposed to allowances, and the section says that where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6 (of which property is one) he will be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year.

The present assessee derives no income under any other head and no deduction can therefore be made from what does not exist. If the only relief which a man can claim on account of loss under one head be a set off against the income under another, nothing can be done. I think, however, that inasmuch as the section is the only one dealing with loss it must be read in as liberal a manner as is possible without importing any new or strange meaning into the words. Now, surely the loss sustained under any head of income would naturally be set off against the profits earned under that same head and it is only where profits under that head are so small that the net result of the calculation is a loss that the necessity arises to set off that loss against profits under another head. Can it then be taken as a matter of course and presumed to be understood that loss can always be set off against profits under the same head? If so, all that is necessary is to read the word "even" into the section and to treat it as saying "he shall be entitled to have the amount of the loss set off against his income, profits or gains under the same head, and even under any other head in that year". This is what I think the section means though the drafting makes it obscure. In *Commissioner of Income-tax, Madras*, v. *M. AR. AR. Arunachalam Chettiar*[1] the learned Chief Justice placed the widest and most liberal interpretation on the same section and I think we should be right in doing the same and in reading it to mean that where there is a *bona fide* loss a man can always set it off against his income, profits or gains under the same head, and in exceptional cases where the loss is so heavy that it more than counterbalances the whole of the profits under that particular head, it may be carried over to another head of income in order that the assessee may obtain his full relief. I would answer the reference accordingly in the negative. The question has become somewhat academic in view of the recent notification.

TEK CHAND J.:—I agree in the answer proposed by my learned brother.

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(437) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Bhide and Mr. Justice Tapp.

(26th February, 1931.)

Ishar Das .. *Assessee*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces. .. *Referring Officer*

Indian Income-tax Act (XI of 1922), Secs. 13 and 66—Assessee not keeping accounts—Loans on mortgages capitalising unpaid interest—Assess-

(1) 1 I. T. C. 278

ment on accrued interest under Sec. 13 proviso—Discretion of Officer as to basis of computation—Merits of assessment, if a question of law.

The assessee, a colliery proprietor who was maintaining proper and regular accounts for his colliery income but kept no accounts for his income from the business of investments of money on mortgages, returned a sum of Rs. 6,378 as interest received in the account year. The Income-tax Officer acting under Sec. 13, proviso of the Income-tax Act added to the interest income returned a sum of Rs. 15,759 being the amount of interest accruing under mortgage deeds which provided for payment of interest half-yearly the same in default of payment to be added to capital. On the contention of the assessee as to the non-assessability of interest accrued but not realised

HELD, that the Income-tax Officer was justified in making the assessment under Sec. 13 proviso and that no question of law was involved in the merits of the assessment or the basis and method employed which under the proviso lay entirely within the discretion of the Officer.

Case [Civil Reference No. 22 of 1930] stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces in compliance with the order of the High Court dated 2nd April 1930.

CASE.

By an order dated 2-4-1930, I have been called upon by the High Court of Judicature at Lahore under section 66 (3) of the Income-tax Act (XI of 1922) to state a case on the following two questions of law arising out of an order passed under section 31 of the Act in the matter of the assessment of the petitioner, L. Ishar Dass, Proprietor of the Kapur Colliery, Pind Dadan Khan, in the Jhelum District, for the year 1927-28:—

(1) Where a colliery proprietor has invested his money in mortgages and loans and has kept proper and regular accounts of his income from the colliery but has not kept any account of his income from his investments in mortgages and loans, is the Income-tax Officer justified in making an assessment of his income under the proviso to section 13 of the Indian Income-tax Act?

(2) Whether in such a case the amount of interest, which has accrued to the assessee, but not realised by him during the accounting period, can be treated as his assessable income?

2. **Facts of the case:**—The facts of the case are that the petitioner does business in the sale of coal and money lending, and income-tax was payable by him under these heads of business in accordance with section 10 of the Act. For the assessment year 1927-28, he originally furnished a return under section 22 (2) in which he declared, besides his income from the colliery, an income of Rs. 3,245 from money lending, but subsequently submitted a revised return, as he was entitled to do under section 22 (3), showing the income from the latter source as Rs. 6,348. The Income-tax Officer then called upon the assessee to produce all his accounts but he produced only those relating to the income of the colliery. No accounts whatever relating to the money lending business were produced, the plea of the assessee being that he did not consider it necessary to keep them because all the money lending business was carried on on the security of mortgage deeds. The

mortgage deeds were seen by the Income-tax Officer, who found that in almost every case the deeds contained a stipulation that interest would be payable half-yearly and in the event of no payment being made, the interest due was to be added to capital. In the absence of accounts, the Income-tax Officer did not accept the income returned from money lending which the assessee alleged represented the actual sum received by him, and computed the income in accordance with the proviso to section 13 of the Act. In doing so, he took into consideration the interest which, according to the terms of the mortgage deeds, fell due. In making the calculation the total compound interest due upto 31-3-1926 was treated as capital and compound interest for the accounting period 1-4-1926 to 31-3-1927 (which was the "previous year" on which the assessment was based) was calculated thereon. On this basis the income was found to be Rs. 15,759. This was added to the sum of Rs. 6,348, alleged by the assessee to have been actually received and the total assessable income from interest was determined at Rs. 22,107. A copy of the relevant portion of the assessment order is attached as Appendix A. * Against this assessment an appeal was lodged before the Assistant Commissioner, who held that since the assessee kept regular accounts in his business connected with the colliery, there was no reason why he did not do the same for his money lending business. He, therefore, drew the inference that the assessee found it to his advantage not to keep accounts for his money lending business. The Assistant Commissioner, however, made a slight modification in the calculation of the income as made by the Income-tax Officer and reduced the income from money lending from Rs. 22,107 to Rs. 21,910. A copy of the Assistant Commissioner's order is attached as Appendix B. * The petitioner then approached my predecessor with an application under section 66 (2), who held that no question of law was involved and declined to make the required reference to the High Court. An application under section 66 (3) was brought before the High Court on which this reference has been ordered to be made.

3. Opinion of the Commissioner :—In regard to the first question, it is admitted that the petitioner earned income from the colliery and money lending. It is also admitted that regular accounts were maintained for the former but that none whatever were kept for the latter source. The Income-tax Officer had then to compute the income of the assessee in accordance with the provisions of section 13 of the Income-tax Act. That section prescribes that "income, profits and gains shall be computed, for the purposes of sections 10, 11 and 12, in accordance with the method of accounting regularly employed by the assessee: provided that, if no method employed has been regularly employed, or if the method of accounting is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine." Now the income from one part of the business, viz., the colliery was computed in accordance with the method of accounting admitted to have been regularly employed and about this there is no dispute. The Income-tax Officer had then to turn his mind to the computation of the income from the business of money lending. He was told quite frankly that for this business no accounts existed. There was therefore no method of accounting regularly employed. In such a case the law imposes upon the Income-tax Officer the imperative duty of computing the income upon such basis and in such manner as he may determine. The assessee had in the course of his money lending business invested money in mortgage deeds and loans,

* Not printed

and by his not keeping accounts to show his income from his loans and investments threw the responsibility of computing the income on the Income-tax Officer, who had to resort to the only course open to him, viz., to estimate the income; and when the law says the income shall be determined on such basis as the Income-tax Officer may employ, determined it must be whatever may be the basis employed. The Income-tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed as has been laid down by the High Court of Judicature at Lahore in the case of *Gokal Chand Jagan Nath v. The Commissioner of Income-tax, Punjab.*[1] That decision applies, *a fortiori*, to this case because not only is there no method of accounting employed, but no accounts whatever. By producing documents alone without any accounts, the assessee cannot be said to have proved anything except that his income is not less than what he says it is. In view of what has been said above, I consider that the first question should be answered in the affirmative.

4. Turning to the second question, viz., whether in the case referred to in the first question, the amount of interest which had accrued to the assessee, but not realised by him during the accounting period, can be treated as his assessable income, it has already been submitted that the only duty imposed upon the Income-tax Officer by law in a case such as this, where no accounts whatever are forthcoming, is to arrive at the income as directed by the proviso to section 13. He is authorised by this section to employ any basis he chooses, so long as he discloses the basis on which he arrives at his conclusion. In this particular case the assessee, in the admitted absence of accounts, could not even show what income had either accrued or been realised by him during the accounting period. Whether accrued interest or realised interest is assessable is a matter to be determined according to whether the accounts are kept on the mercantile or cash basis. In this case, however, neither have been employed and since no accounts whatever were kept, it was left to the Income-tax Officer to make the assessment as best he could. It was then open to him to take into consideration all the investments and to arrive at the income by calculating the interest which according to the stipulated terms of the mortgage deeds the assessee had the right to receive. This was but one way of arriving at the income to be assessed c.f. in this connection the ruling of the High Court of Lahore in the case of *Daya Ram Sobha Ram* v. *The Commissioner of Income-tax, Punjab.*[3] Again in the case of *Duni Chand Dhani Ram v. The Commissioner of Income-tax, Punjab* [2] the Hon'ble Judges of the Lahore High Court enunciated the principles which could justify an assessment under section 13. Their Lordships agreed that so long as the Income-tax Officer indicates the manner in which the estimate of income had been arrived at, it would be regarded as being in conformity with the section. In this case the Income-tax Officer took into consideration all the material available to him, for the purpose of computing the income from money lending and as there was not only no system of accounting but no accounts whatever, he was in my opinion justified in taking into account the income which according to the terms of the mortgage deeds had fallen to the assessee. For the above reasons I would answer the second question also in the affirmative.

Nand Lal, for the Assessee.

Aggarwal and *Soni,* for the Crown.

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(1) 2 I. T. C. 180.
(2) 2 I. T. C. 188.
(3) 2 I. T. C. 226.

JUDGMENT.

TAPP J.:—In compliance with a mandamus granted by this Court the Commissioner of Income-tax, Punjab, North-West Frontier Province and Delhi, has referred the following two questions for decision:—

(1) Where a colliery proprietor has invested his money in mortgages and loans and has kept proper and regular accounts of his income from the colliery but has not kept any account of his income from his investments in mortgages and loans, is the Income-tax Officer justified in making an assessment of his income from his investments under the proviso to section 13 of the Indian Income-tax Act?

(2) Whether in such a case the amount of interest which had accrued to the assessee but *not realised* by him during the accounting period, can be treated as his assessable income?

In his statement of the case the Commissioner has answered both the questions in the affirmative.

The petitioner is the proprietor of the Kapur Colliery at Pind Dadan Khan in the Jhelum District and in addftion to his dealings in coal carries on an extensive money lending business. That this latter is not merely a side line is evident from the return made by him of his income from interest during the year 1926-27. This was at first given as Rs. 3,245 but later in a revised return as Rs. 6,348.

It has been found as a matter of fact and is indeed admitted that for the colliery business regular accounts are maintained but none in respect of the money lending transactions, the reason given by the petitioner being that accounts were unnecessary as all loans were secured by mortgage deeds. These deeds were produced and examined by the Income-tax Officer, who found that in nearly every case the terms involved the payment of interest half-yearly and in event of failure the addition of such interest to capital. No method of accounting being employed the Income-tax Officer in accordance with the proviso to section 13 of the Act treated all interest so accruing, arising or received during the accounting period of 1926-27, and which he found amounted to Rs. 15,759 as income. Adding this to the sum of Rs. 6,348 returned by the petitioner the total assessable income from interest was fixed at Rs. 22,107. This figure was subsequently reduced on appeal to Rs. 21,916.

Now once it is established that no method of accounting has been regularly employed or that the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom the proviso to the section comes into operation and the Income-tax Officer becomes the sole arbiter of the basis on which, and the manner in which, they shall be computed.

Thus it seems clear that given a certain state of facts the law enjoins that a computation shall be made upon some other basis and in some other method, both these two factors being entirely within the discretion of the Income-tax Officer. The adoption of a particular basis and a certain method cannot in the circumstances give rise to any question of law.

The argument of Doctor Nand Lal that the proviso is not applicable unless it is shown that there has been an income, profit or gain is entirely beside the point.

For the above reasons I would hold that the answer to the first question is clearly in the affirmative.

In my opinion the second question does not arise as once it is found that the proviso applies the basis and method employed by the Income-tax Officer in making the computation lie entirely within his discretion and the merits of these do not involve any question of law. In the circumstances it is unnecessary to set out and comment on the authorities cited by Doctor Nand Lal as they all relate to this particular point.

I would direct that the petitioner do pay the costs incurred by the Commissioner in all the proceedings in this Court.

BHIDE J.:—I concur.

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(438) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Addison and Mr. Justice Bhide.

(27th February, 1931.)

The Bharat Insurance Company Ltd. .. *Assessees*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces. .. *Referring Officer*

Indian Income-tax Act (XI of 1922)—Life Assurance Company with shareholders and participating policyholders—Surplus actuarial valuation, allocation of, for payment to policyholders—If assessable as profits of the Company.

The sum of money allocated for payment to participating policyholders out of the surplus shown in the quinquinnial actuarial valuation of a life insurance company having distinct shareholders, represents part of the profits of the company assessable to income-tax and is not expenditure incurred for earning the profits allowable under Sec. 10 (2) (ix) of the Income-tax Act.

Last *v.* London Assurance Corporation 2 Tax. Cas. 100, *Followed.*

Case [Civil Reference No. 26 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. Frontier Provinces for the opinion of the High Court.

CASE.

In a combined application under Secs. 33 and 66 (2) of the Income-tax Act XI of 1922, I am asked to review the assessment of the above Company for the year 1929-30 by allowing a set off of a sum of Rs. 4,68,394 distributed amongst the participating policyholders of the Company against quinquinnial profits on the basis of which an income of Rs. 1,32,387 was assessed or in the alternative to refer the following question of law to the High Court of Judicature at Lahore under Sec. 66 (2) of the Act, viz.,:—Whether the sum of Rs. 4,68,394 admittedly distributed amongst the participating policyholders

should not be set off against the quinquinnial valuation on the basis of which the Company has been assessed.

The question arises out of the order passed under Sec. 31 of the Act, and as I agree with the view taken by the Assistant Commissioner and have declined to interfere with the assessment under Sec. 33, I proceed to refer for the orders of the High Court under Sec. 66 (2) the question which the petitioner Company asks me to refer which however I would amend and formulate as follows:—Whether the sum of Rs. 4,68,394 distributed amongst the participating policyholders represents part of the profits assessable to income-tax, or an expenditure incurred for earning the profits of the Company.

2. **Facts of the case**:—The Bharat Insurance Company Ltd: (hereafter referred to as the Company) was established in 1896 with its head office at Lahore and it has branches at various places throughout India. The objects for which it was established are enumerated in Article 3 of the Memorandum of Association and the business to be transacted by the Company is shown in Article 4 of the Articles of Association attached thereto (Appendix A). The capital of the Company is Rs. 15,00,000 divided into 15,000 shares of Rs. 100 each. In connection with the Life Assurance business done by it two kinds of insurances are effected: One is that in which policyholders are entitled to participation in profits and the other is without participation. In the case of the former the rates of premia paid by policyholders are higher than those in that of the latter. The Company derives its income mainly from premia. A quinquinnial actuarial valuation of the Company was made for the period ending 31-12-1923. On page 6 of this report will be found a consolidated Revenue Account for the five years ending 31-12-1923, which for facility of reference is reproduced below:—

		Rupees.
Amount of Life Assurance Fund at the beginning of the period.		24,81,142
Premiums.		34,28,001
Interest, Dividends and rents	11,67,697	
Less income-tax	17,880	11,49,817
Miscellaneous receipts.		5,433
		70,64,393

	Rupees.
Carried forward for Dividend.	54,657
Claims under Policies paid and outstanding	
By death	720132
By maturity	866186
	15,86,318
Surrenders.	24,142
Annuities.	4,740
Bonuses in cash	16,769
Expenses of management	7,22,524
Commission	2,71,840
Bad debts	659
Amount written off Furniture and books.	5,667
Investment Depreciation Fund.	35,000
Life Assurance Fund at the end of the period.	43,42,077
	70,64,393

The valuation balance sheet on the same page showed a surplus of Rs. 5,96,952 which was allocated as follows:—

	Rupees.
(a) Among policyholders with immediate participation (these were 6,327 in number, with sums assured amounting to Rs. 1,18,08,354)	4,68,394
(b) There were no policyholders with deferred participation in profits	-- --
(c) Among the shareholders.	42,476
(d) By way of increase in the Investment reserve fund.	-- --
(e) Carried forward unappropriated.	6,082
	5,96,952

Para 8 of the report on the quinquinnial valuation referred to above shows that "the participating policyholders are entitled to 90% of the profits made in the participating branch of the business. The profits have been applied in the form of a simple reversionary bonus, at the rate of 2% upon the sum assured for each complete year's premium paid or payable since the last valuation, calculated up to the valuation date. In respect of assurance under which less than 5 years' premiums had been paid, the bonus is provisionally allotted and vests after payment of five years' premiums. These principles have been determined by the Board of Directors" and para 9 (2) shows that "the reversionary bonus allotted to a policy of Rs. 1,000 after five years' duration was, at all entry ages and in all classes of assurance Rs. 100. No participating policy had attained 20 years' duration at the valuation date".

Under section 59 (2) (a) (ii) of the Income-tax Act, special rules have been made prescribing the manner in which and the procedure by which income, profits and gains shall be arrived at in the case of Insurance Companies. Those rules are contained in the Notification of the Board of Inland Revenue (now the Central Board of Revenue) No. 3—I. T. dated the 1st of April 1922 as subsequently amended. Rule 25 of that Notification prescribes that "in the case of Life Assurance Companies incorporated in British India whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the Life Assurance business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deduction made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income-tax assessment and any Indian Income-tax deducted from or paid on income derived from investments before such income is received shall be added to the net profits disclosed by the valuation". The actuarial valuation with which this reference is concerned is embodied in the Company's Report on the quinquinnial valuation at 31st December 1923 referred to above.. This report was for the first time adopted in the assessment for the year 1925-26. As will have been observed it disclosed a surplus profit of Rs. 5,96,952 which owing to the disallowance of certain inadmissible deductions was raised to Rs. 6,61,935 by the Income-tax Officer, who in accordance with the rule quoted above, worked out the average figure of Rs. 1,32,387 for the five years ending 31-12-1923 and assessed it to income-tax. Since then upto the assessment for the year 1929-30 the Company declared this sum of Rs. 1,32,387 as its income under Sec. 22 (i) of the Income-tax Act. The assessment for the year 1929-30 was made under Sec. 23 (1) on the income so declared and was not objected to before the Income-tax Officer. An appeal was however lodged before the Assistant Commissioner in which it was claimed that in

working out the average of Rs. 1,32,387 the sum of Rs. 4,68,394 paid as profits to the participating policyholders should have been deducted from the total surplus of Rs. 5,96,952. The appeal was rejected by the Assistant Commissioner by his order under Sec. 31 dated 28-11-1929 in which it was held that the amount in question was part of the profits liable to taxation. The Company then presented an application for a review of the case under Section 33 or in the alternative asked that it be referred to the High Court under Sec. 66 (2). As already stated, the petition for review has been rejected with the result that the case is referred to the High Court under Section 66 (2).

3. **Opinion of the Commissioner** :—The facts of the case show that the Company is not a mutual insurance company, but is constituted by shareholders who are entirely distinct from the participating policyholders and that the amounts distributed among the latter clearly form part of the surplus profits of the Company. My opinion on the question, as amended by me, therefore is that the first part be answered in the affirmative and the latter in the negative in accordance with the decisions of the House of Lords in *Last v. London Assurance Corporation* [1] which was re-affirmed in *Styles v. New York Life Insurance Company.* [2]

Madan Gopal and *Badri Nath*, for the Assessees.

Jagan Nath Aggarwal and *R. C. Soni*, for the Crown.

JUDGMENT.

BHIDE J.:—This is a reference under section 66 (2) of the Indian Income-tax Act, 1922, in which the following question of law has been referred to this Court for decision:—"Whether the sum of Rs. 4,68,394 distributed amongst the participating policyholders represents part of the profits assessable to income-tax or an expenditure incurred for earning the profits of the Company."

The material facts bearing on the question are briefly as follows: The Bharat Insurance Company, on whose application the reference has been made has two kinds of policyholders, viz., those who are entitled to participate in the profits of the Company and those who are not so entitled. According to the rules of the Company, the policyholders of the first kind are entitled to 90% of the profits of the Company on that part of the business. A periodical valuation of the profits of the Company is made every five years. In the quinquinnial report for 1923-24 on the basis of which income-tax was assessed for the next five years a sum of Rs. 4,68,394 was shown as "allocated for distribution amongst policyholders with immediate participation." This sum was not actually distributed amongst the policyholders, but represented (as was stated before us at the hearing) the capitalised value of the amount which would have to be ultimately distributed amongst the policyholders. The sum of Rs. 4,68,394 was included in the profits of the Company on which the income-tax was assessed according to the practice followed up till now and the Company also paid the tax up to 1929-30 without demur. In that year, too, no objection was raised before the Income-tax Officer, but an appeal was lodged before the Assistant Commissioner of Income-tax, in which an objection was raised for the first time that the aforesaid sum of Rs. 4,68,394 really represented expenditure of the Company incurred solely for the purpose of earning its profits and as such should have

(1) 2 Tax Cas. 100

(2) 2 Tax Cas. 460

been exempted from assessment under section 10 (2) (ix) of the Income-tax Act. The appeal was rejected by the Assistant Commissioner. The Company then presented an application for a review of the case under section 33 of the Act, or in the alternative, for a reference to this Court under section 66 (2). The Commissioner of Income-tax rejected the application for review, but has referred the question stated at the outset for the decision of this Court.

The contention of the learned counsel for the Bharat Insurance Company is that the policyholders, who participate in the profits, have to pay a higher premia and 90% of the profits are offered to the policyholders merely to attract a larger capital for the business of the Company. The policyholders are not constituents of the Company like shareholders, and the share of the profits, which is paid to them is really in the nature of the expenditure, which the Company has to incur for earning the profits. Under section 3 of the Indian Income-tax Act, it is the profits of the Company which are chargeable and the profits paid to the policyholders, who are not included amongst its constituents, cannot therefore be properly included in the profits of the company. No Indian authority on the point was cited. As regards the English authorities, the precise question, which has been referred to us for opinion, seems to have been raised in *Last v. London Assurance Corporation.*[1] This case went up to the House of Lords and, though there was a difference of opinion amongst the Judges, the ultimate decision of the majority was that the share of the profits paid to policyholders in circumstances similar to those of the present case is a part of the profits of the Corporation and as such assessable to income-tax. The learned counsel for the Bharat Insurance Company sought to distinguish this case on the ground that there are differences between the provisions of the Indian and the English Income-tax Act.

It will appear from the above that the decision of the question referred in this case depends mainly on the interpretation of the word 'profits' for the purpose of the assessment of the Company to income-tax. There is no definition of the word given in the Act itself. There is no doubt that the amount in dispute has been treated by the Company itself as a portion of its 'profits', for it is described as equivalent to 90% of the 'profits' and is payable to policyholders who have taken endowment policies 'with profits'. The learned counsel for the Company has, however, argued that this is only a loose use of the word and, strictly speaking, the amount in question is a part of the expenditure of the Company, which must be deducted before we can arrive at the true profits of the Company.

In *Mersey Docks and Harbour Board v. Lucas,*[2] the word 'profits' was interpreted by the House of Lords to mean "the net proceeds of a concern after deducting the necessary outgoings without which those proceeds could not be earned or received" or "income of whatever character it may be, over and above the costs of receipts and collection" and the "gains of a trade" were taken to be "whatever was gained by the trading, for whatever purpose it was used". The same view was adopted by the majority of that House in *Last v. London Assurance Corporation.*[1]

There is nothing to show that the word 'profits' is used in a different sense in the Indian Income-tax Act. In *Board of Revenue* v. *AL. AR. RM. Arunachalam Chettiar,*[3] a similar interpretation was adopted by a Special Bench of the Madras High Court on the basis of several English decisions

(1) 2 Tax Cas. 100 (2) 2 Tax Cas. 25 (3) 1 I. T. C. 75

and it was pointed out by Wallis C.J. in his judgment (vide p. 79) that "having regard to the uniform interpretation placed by the Courts on the corresponding language of Schedule D and accepted by the Legislature it is not open to this Court to place a different interpretation on the word 'profits' occurring in section 9 of the present Act etc., etc." The Income-tax Act then in force was the Act of 1918, but there seems to be no material difference in the provisions of that Act and the present Act so far as the point under discussion is concerned.

I must, therefore, accept the above interpretation of the word and hold that the "profits of a business" mean the "net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned", and that these net proceeds must be taken to be the basis for the assessment of income-tax irrespective of their subsequent application or allocation. According to section 10 of the Act, the tax is payable by the assessee 'in respect of the profits or gains of any business carried on by him'. The Income-tax Officer is, therefore, concerned with the 'profits of the business' and not with the net dividend paid to the shareholders. It is true that according to section 3 of the Act the tax is chargeable on all income, profits and gains of the Company, but that section is subject to the other provisions of the Act and must be read along with section 10. It is also to be borne in mind that the Company has a separate legal entity and the dividend paid to the shareholders is by no means equivalent to the real profits of the Company.

According to section 10 of the Income-tax Act, only certain deductions are permissible in estimating the 'profits' and the word is thus used in a special sense. Certain deductions which may be permissible in an ordinary commercial balance sheet in estimating profits are consequently not permissible at all under section 10. Under section 10 (2) (iii), e.g., interest on capital cannot be deducted from profits, if that interest is in any way dependent on the earning of the profits, although the payment of such interest must necessarily reduce the amount available for distribution amongst the shareholders. The present case is, in its essence, of the same type. The premia paid by the policyholders are a part of the capital of the insurance company. Policyholders who participate in the profits have to pay higher premia and the bonuses paid to such policyholders are in the nature of additional interest paid to these policyholders. But this payment is dependent upon the existence of profits and hence on the principle of section 10 (2) (iii) referred to above, such payment cannot be deducted in estimating the profits.

The contention of the learned counsel for the Company that the payment of the bonus is really an expenditure incurred solely for earning the profits does not appear to be sustainable. Any expenditure incurred solely for the purpose of earning profits would ordinarily precede and not follow the accrual of the profits. It would certainly not be dependent on the existence of those profits. In the present instance, the participating policyholders are paid the bonuses only if there is any profit but not otherwise. In other words, the expenditure has not necessarily to be incurred for the purpose of the business but is contingent on the existence of a surplus. Again the payment of bonuses may have different objects in view and may not be intended solely for earning higher dividends for the shareholders even if the word 'profits' were to be understood in that restricted sense. The object e.g., may be the creation of a larger Reserve Fund out of the larger surplus of income over expenditure, for the stability of the Company. In these circumstances

I do not think these bonuses can be properly considered to be "an expenditure incurred solely for the purpose of earning the profits." As held by Lord Blackburn in *Last v. London Assurance Corporation,*[1] the bonuses seem to represent really a share in the profits of the business of the Company purchased by the participating policyholders.

The learned counsel for the Company has urged that there are some differences between the English and the Indian Income-tax statutes, but he has not been able to point out any which may be considered to be material for the purposes of the present issue. The Indian Act is based largely as is well-known on the English Act. Here as in England the tax is payable on the profits of a business, and in calculating the 'profits', certain deductions are permissible while others are not. The learned counsel for the Company drew our attention to section 54 of 5 and 6 Vic. Chapter 35 to which Lord Blackburn has referred in his judgment in *Last v. The London Assurance Corporation.*[1] According to this section an estimate of the profits and gains has to be made in England before "any dividend shall have been made thereof to any other persons, corporations, or companies having a share, right or title in or to such profits or gains". But the interpretation of this provision was itself a subject of difference of opinion amongst the Judges and the judgment of Lord Blackburn mentions this provision only incidentally and is not based on it. The learned counsel further stated that in England bonuses paid to policyholders were subsequently exempted from income-tax subject to certain reservations (c.f., section 16 of the Finance Act 1923). It is, of course, open to the Legislature to adopt the same course in this country. We are concerned only with the interpretation of the law as it stands. After carefully considering the provisions of the Indian Income-tax Act I am unable to see any good grounds to justify a different view being taken in the present case to that taken by the House of Lords in *Last v. The London Assurance Corporation.*[1]

The established practice in this country is apparently in accordance with that view (c.f., Sundaram's Law of Income-tax in India, 2nd edn. page 585). Any departure from the above interpretation of the law would, therefore, require very cogent reasons (cf. I. L. R. 35 Cal. 713 and 43 Cal. 750) and no such reasons have been, I think, made out in the present case.

For the reasons stated above it seems to me that the aforesaid sum of Rs. 4,68,394 allocated for distribution amongst the participating policyholders must be considered to be a portion of the profits of the Company and as such assessable to income-tax and not an expenditure incurred solely for earning the profits within the meaning of section 10 (2) (ix) of the Indian Income-tax Act 1922. I would answer the question accordingly, but as the law point involved is not free from difficulty, I would make no order as to costs.

ADDISON J. :—I concur.

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(1) 2 Tax. Cas. 100.

(439) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Mr. Justice Sir C. C. Ghose Kt., and Mr. Justice Buckland.

(27th February, 1931.)

Krishna Kumar and Mahendra Kumar Ghose .. *Assessees*

vs.

The Commissioner of Income-tax, Bengal. .. *Referring Officer*

Indian Income-tax Act (XI of 1922) Secs. 23 (4) and 66 (2)—Assessment under Sec. 23 (4) without stating basis or details—Legality—Statement of case by Commissioner, Requisites of—Proper procedure.

An assessment by the Income-tax Officer on non-submission of return and non-production of accounts called for by him, simply stating 'Business Rs. 30,000' without giving the basis or details is an assessment to the best of his judgment within the meaning of Sec. 23 (4) of the Income-tax Act.

On an application under Sec. 66 (2) of the Act the Commissioner should keep entirely separate his order or judgment on the application and the case stated which is only concerned with the questions which he intends to refer to the High Court and the facts bearing thereon. If the Commissioner thinks there is a point of law which the assessee has not stated properly he is not bound to refuse reference but can frame it properly himself and refer it.

Case stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The following statement of the case of Messrs. Krishna Kumar and Mahendra Kumar Ghose, hereinafter referred to as "the assessees", is drawn up and referred to the Hon'ble High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) in accordance with their application purporting to be in terms of that section.

2. The facts are that the assessees carry on a wholesale rice business. A notice under section 22 (2) of the Indian Income-tax Act was served on them by the Income-tax Officer, Calcutta District II (2), calling for their return of income to be submitted on or before the 24th of May, 1929. On the 29th May, in compliance with their request, time was allowed until the 7th July to submit the return and they were informed. On the 10th July, no return having been filed, a notice under section 22 (4) was ordered to be issued directing accounts to be produced on the 14th of August. By mistake a combined notice under sections 22 (4) and 23 (2) was actually issued and served. On the 14th of August a prayer was made for time on account of illness. The Income-tax Officer refused to allow time, but subsequently discovered the mistake above referred to. He, therefore, corrected the mistake by issuing a fresh notice under section 22 (4) for production of accounts on the 17th August. This notice was served on the 15th August. On the 17th August another application for time was made on the plea that

the Accounts Sircar had fallen ill and gone home. The application was rejected, and, after local enquiry had been made, assessment was completed under section 23 (4), both for default of submission of return and for non-compliance with the notice under section 22 (4). An application for re-opening the assessment was made under section 27. The plea was that the representative had understood from the Income-tax Officer on the 17th August that a last adjournment would be allowed. The Income-tax Officer rejected the application, and the rejection was upheld by the Assistant Commissioner in appeal. Clearly the plea was concocted, and, even if true, would not help the assessees' case. Thereupon the assessees made this application under section 66 (2).

3. The following points of law were formulated by the assessees.

(*a*) Whether an assessment, in which there is an error in the ascertainment of the status of the assessees, is valid in law? When there is an error in the application of the charging section, namely, section 3, are not all subsequent proceedings, namely those under sections 22 and 23 illegal?

(*b*) The Income-tax Officer simply puts "Business—Rs. 30,000". No basis or details are apparent. Can this be an assessment to the best of one's judgment?

(*c*) Is an assessment valid or legal when it includes a source which the assessee did not have?

(*d*) Is an assessee precluded from raising the point (c) if he has allowed the previous assessments to go unchallenged for the sake of convenience?

(*e*) When the assessment is made for house property, is not the assessee entitled to know what premises are implied? The assessment order says nothing about the premises.

(*f*) Was the order dated the 14th August 1929 "for some requisitions" a proper order under section 22 (4)?

(*g*) The notice wants Pucca Khatian, Khasra Khatian, and ledger. Nobody has got more than one of these inasmuch as all three are same. It is needless to mention, that the Income-tax Officer did not apply his mind at the time of making the requisition. In the circumstances, is the requirement valid?

4. My opinion on each of these questions is given below.

Question (a). The facts are that the assessment was made on the assessees as a Hindu Undivided Family for the reason that they had always been assessed as such and had never objected. The assessees now assert that the joint family was dissolved some years ago. Question (a) was not actually raised before the Assistant Commissioner. It is true that, in appeal, the question whether the *notice* under section 22 (2) was illegal, as issued upon a non-existent Hindu undivided family was raised, but the question was based upon a mistake of fact and, in any case, was a different question from the question now put forward. Nor, had the question been actually raised in appeal, would the Asst. Commissioner have had jurisdiction in terms of sections 30 and 31 of the Indian Income-tax Act to consider and decide

the question. The sole question which could arise for the decision of the Assistant Commissioner was whether the assessees were prevented by sufficient cause from submitting their return and producing their accounts. For this reason, according to my reading of section 66 (2) the question does not arise out of the appellate order and I am not authorised by the terms of section 66 (2) to refer it to the Hon'ble High Court. I, therefore, do not refer this question, but consider it necessary, in case my interpretation of the law is held by the Hon'ble Court to be incorrect, to give my opinion on the question.

5. The question includes two distinct questions. The second of the two questions is obscure and confused. The intention is to be gathered from paragraph 4 of the written application under section 66 (2) in which it is set down as follows: "Your petitioner considers that the notice under section 22 (2) as well as the assessment are illegal, as the finding under section 3 should precede all proceedings under sections 22 and 23." But section 3 merely lays down who the persons and the associations are who are liable to income-tax. There can therefore be no finding under that section, either preliminary or otherwise, or any "application" of the section, whatever that term may connote. On the contrary, section 22 (2) authorises an Income-tax Officer to serve a notice to make return of income upon any person other than a company. Thus there is one form of notice and one form of return, the latter prescribed by the Statutory Rules (Rule 19) for use in the case of all persons other than companies. The status of persons cannot often be known except by means of the proceedings prescribed by the Act. It is moreover open to assessees to raise the question of their status during proceedings and there is no provision in the Act or necessity for provision of preliminary proceedings for the determination of status. All that is requisite is that the notice under section 22 (2) should be correctly addressed, and, in this case, it is admitted that the notice was correctly addressed according to the style under which the assessees conduct their business. Thus the determination of the status of an assessee is not a necessary preliminary to the institution of proceedings under the Act but is a question to be determined during and by means of those proceedings. The second part of question (a), therefore, rests upon a misapprehension and is omitted from the reference.

6. The first part of question (a) begs the issue by assuming that the assessees are not a Hindu Undivided Family. There is no means either of establishing or of rebutting this presumption. This fact, in itself, demonstrates clearly the irrelevancy of the question. Even assuming that the presumption is correct it cannot, therefore, be argued that the assessment was thereby illegal. All that the law requires is that the assessment should be made to the best of judgment on the facts available. Absolute accuracy cannot be expected, if, as in the present case, the help of the assessee is withheld. Otherwise the provisions of section 23 (4) are made of no effect. My opinion, therefore, is that the question should be answered accordingly.

7. Question (b) was outside the jurisdiction of the appellate officer and was not actually dealt with by him. As such, the question does not arise out of the appellate order, and is not referable under section 66 (2), in my opinion. At the same time the Hon'ble Judges of the Burma High Court, in *S. P. K. A. A. M. Chettiar Firm v. The Commissioner of Income-tax, Burma,*[1] did deal with a similar question, and, in view of their decision

(1) 4 I. T. C. 182

on which the assessees rely, I consider that the assessees are entitled to the decision of the Hon'ble High Court on this question. I, therefore, refer question (b).

8. The facts are that the Income-tax Officer made a local enquiry before making his assessment. He recorded a note of the details and results of his enquiry. A copy of his note will be included in the paper book for the information of the Hon'ble Court. He did not, however, allow a copy of this note to be given to the assessees. It will be observed that no order in writing is prescribed by law in the case of an assessment under section 23 (4) as distinguished from an assessment under Sec. 23 (3). In his separate assessment note, of which a copy was sent to the assessees, the Income-tax Officer gave in full the reasons for which he had made the assessment under section 23 (4) in order to enable them to make an application under section 27, if they so wished, but, in regard to the finding of total income, he set down nothing more than the following "I have enquired into the case and estimate the income as under:

Business	..	30,000
House property	..	2,100"

A person assessed under section 23 (4) has no right of appeal against the assessment on the merits. Evidently, the Legislature recognised that in such circumstances, brought about by his own failure to discharge his statutory obligations, he was not entitled to receive a written order stating the manner in which his income had been computed. Nor, I may add, would such an order be of any use to him in the absence of any right of appeal.

My opinion therefore, is that the answer to the question is that, in the circumstances, the assessment was made to the best of the judgment of the Income-tax Officer.

9. Questions (c), (d) and (e) have reference to the inclusion in total income of Rs. 2,100 on account of house property. I consider that none of these questions is referable under the terms of section 66 (2), for the reason that the appellate authority had no power to deal with them and did not deal with them, but, if the Hon'ble Court holds otherwise, then my opinion on each question is as follows.

10. Question (c) rests upon a presumption, viz., that the assessees own no house property, which there is no means either of establishing or of rebutting, a fact which demonstrates clearly the irrelevancy of the question. Even, however, if that presumption is made, my opinion is that in the circumstances detailed and for the reasons advanced above in paragraphs 6 and 8, the assessment was legal and valid and that the question should be answered accordingly.

Question (d) does not arise in the case of an assessment under section 23 (4).

Question (e) should be answered in the negative for reasons advanced in paragraph 8 in regard to the question (b).

11. Question (f) has reference to the order passed by the Income-tax Officer on the order sheet of the case under date 14th August directing issue of the second notice under section 22 (4). The order was merely a direc-

tion to his office to write out and prepare for his signature a notice under that section, and no question of law can arise out of any such direction. The learned pleader for the assessees admitted to me that the actual notice which issued was in order. In any case the question is based upon a copying error. The actual order passed was as follows "Issue notice under section 22 (4) for same requisitions", meaning the requisitions previously ordered in connection with the first defective notice. Certainly the written word might be either "some" or "same", but, in the circumstances, there can be no doubt that the Income-tax Officer actually intended "same". In any case this question was not raised in appeal. Question (f) is therefore omitted from the reference.

12. In regard to Question (g) the facts are as stated in the question. The explanation of the Income-tax Officer is that, no return having been filed he did not know what accounting period was kept by the assessees and therefore called for the Bengali ledgers (Khatian) as well as the English ledger to be on the safe side. He might, of course, have consulted previous records.

13. This question was not raised in appeal and, for this reason, in my opinion, cannot be raised under section 66 (2). In case my view is incorrect, my opinion on the question is that any such error could not invalidate the notice. The assessees were not prejudiced, since they knew that according to the general principle *Lex non cogit ad impossibilia*, they would not be penalised for non-production of books which they did not keep. The answer to the question is, therefore, in my opinion, that the notice was a valid notice.

14. In any case, even if the notice is held to have been illegal, this would not invalidate the assessment, which was made under section 23 (4) not only for lack of compliance with the said notice, but also in default of submission of return.

On the Reference coming on for hearing, the Court on the 24th November 1930 delivered the following judgment sending the case back to the Commissioner of Income-tax for stating a proper case.

ORDER REMITTING CASE.

RANKIN, C. J.:—In this case, the Commissioner of Income-tax has stated a case to this Court in a manner which cannot be accepted and the matter must go back to him to state a case properly. It appears that in this case, as in many other cases which I have noticed, the Commissioner of Income-tax attempts two things by the same document. An application is made to him and he is asked to give certain findings in connection with an income-tax assessment and, if he takes a certain view, the assessee asks him to refer certain points of law to the High Court. It is quite correct and proper that the Income-tax Commissioner should write a judgment, so to say, giving his reasons for the conclusion to which he comes. But if part of the conclusion to which he comes is that it is right to refer a certain question to the High Court, then he ought in strictness to make out another document, namely, a statement of the case upon that point for the opinion of the High Court. The order that he makes will no doubt give reasons why he will state a case on a certain question and refuses to state a case on other questions but, when he comes to state a case, he has got past that stage, and is

only concerned with the questions which he intends to refer to the High Court, and the facts bearing thereon. We do not expect to be troubled with all kinds of questions which he makes up his mind not to refer to the High Court. If he keeps the two things entirely separate, namely, first, his order or judgment on the application made to him, and then the case stated which he is minded to refer to the High Court, the matter will be clear. In many cases, the two things might with great advantage be separate documents.

In the present case, questions were put to the Commissioner by the assessees as points of law running to the number of seven. Some of them were very badly framed because they are stated as abstract propositions and not in such a way as a person accustomed to formulate these questions would do: "Whether an assessment in which there is an error in the ascertainment of the status of the assessees is valid in law". That is far too general a question. If it has got some bearing upon the present assessees' case, let it be stated in a concrete way. If the assessee wants to ask whether all subsequent proceedings are illegal in this case by reason of a certain thing, by all means let him so state. If the question put is "When there is an error in the application of the charging section, namely, Sec. 3, are not all subsequent proceedings, namely, those under Secs. 22 and 23 illegal?" The answer is that these things are not dealt with by this Court in any abstract or unpractical way and the Income-tax Officer and the people who propound to him questions should formulate proper questions.

In this case, the matter is in a worse condition because, with regard to many of these questions, the Income-tax Commissioner appears to say that he does not refer them to this Court and at the same time he states his opinion at length upon them apparently in case this Court should deal with something which has not been referred to it at all. This the Court cannot and will not do. As regards question (b), the position is worse still because after saying and giving reasons why this question is not referable he says: "I therefore refer question (b)". What is this Court to make of that? With regard to other questions also, though the Income-tax Commissioner has apparently made up his mind not to refer them, at the same time it is impossible for the assessees to say whether he is nevertheless meaning to refer them in a hypothetical way. They do not know whether to apply under section 66 (3) or not.

This case must go back to the Income-tax Commissioner and I must beg him, first of all to make up his mind what question or questions he is going to refer to this Court. If he is not going to refer any question, then he should leave out all mention of it in the stated case. When he knows what he is to refer and states the facts relevant to these points, it will be possible for this Court to deal with the matter. I would add that if the Commissioner thinks that there is a point of law proper to be referred he is not bound to refuse merely by reason that the assessee has not framed it properly. He can frame it properly himself and then refer it. The case must go back to the Income-tax Commissioner to state a proper case.

GHOSE J.:—I agree.

BUCKLAND J.:—I agree

The Commissioner of Income-tax in compliance with the above order referred the following case.

SUPPLEMENTARY CASE.

This case was originally stated by my predecessor in office, but was returned to me by the Hon'ble High Court who found certain defects in the reference. By the order of the Hon'ble High Court referring the case back to me I have been asked to determine clearly what question or questions of law I wish to refer to the High Court. I have examined the record and my personal opinion is that no question of law for reference to the Hon'ble High Court arises out of the appellate order in this case. My predecessor in office seems to have referred question (b) only, but as the assessment was made under section 23 (4) there was no appeal given by the law on the merits of such assessment. As such the question does not in my opinion arise out of the appellate order at all. As, however, the matter was already referred to the Hon'ble High Court by my predecessor in office the law does not seem to permit me to refuse to state a case at this stage. On a careful perusal of the record I find that my predecessor in office wanted really to refer only one question, viz., question (b). I therefore beg to refer this question only and state the case as follows:—

2. The facts are that the assessees carry on a wholesale rice business. A notice under section 22 (2) of the Indian Income-tax Act was served on them by the Income-tax Officer, Calcutta District II (2) calling for their return of income to be submitted on or before the 24th May, 1929. On the 29th May in compliance with their request, time was allowed until the 7th July to submit the return and they were informed. On the 10th July, no return having been filed issue of a notice under section 22 (4) directing accounts to be produced on the 14th of August was ordered. By mistake a combined notice under sections 22 (4) and 23 (2) was actually issued and served. On the 14th of August a prayer was made for time on account of illness. The Income-tax Officer refused to allow time, but subsequently discovered the mistake above referred to. He, therefore, corrected the mistake by issuing a fresh notice under section 22 (4) for production of accounts on the 17th August. This notice was served on the 15th August. On the 17th August another application for time was made on the plea that the Accounts Sircar had fallen ill and gone home. The application was rejected, and, after local enquiry had been made, assessment was completed under section 23 (4) both for default of submission of return and for non-compliance with the notice under section 22 (4). An application for re-opening the assessment was made under section 27. The plea was that the representative had understood from the Income-tax Officer on the 17th August that a last adjournment would be allowed. The Income-tax Officer rejected the application, and the rejection was upheld by the Assistant Commissioner in appeal. Clearly the plea was concocted, and, even if true, would not help the assessees' case. Thereupon the assessees made this application under section 66 (2).

3. The following points of law were formulated by the assessees:

(a) Whether an assessment, in which there is an error in the ascertainment of the status of the assessees, is valid in law? When there is an error in the application of the charging section, namely section 3, are not all subsequent proceedings, namely those under sections 22 and 23 illegal?

(b) The Income-tax Officer simply puts "Business Rs. 30,000." No basis or details are apparent. Can this be an assessment to the best of one's judgment.?

(c) Is an assessment valid or legal when it includes a source which the assessee did not have? (d) Is an assessee precluded from raising point (c) if he has allowed the previous assessments to go unchallenged for the sake of convenience?

(e) When the assessment is made for House property, is not the assessee entitled to know what premises are implied? The assessment order says nothing about the premises.

(f) Was the order dated the 14th August 1929 "for some requisitions" a proper order under section 22 (4)?

(g) The notice wants Pucca Khatian, Khasra Khatian, and ledger. No body has got more than one of these in asmuch as all the three are the same. It is needless to mention, that the Income-tax Officer did not apply his mind at the time of making the requisition. In the circumstances, is the requirement valid?

Of these I refer only question (b).

The facts are that the Income-tax Officer made a local enquiry before making this assessment under section 23 (4). He recorded a note of the details and results of his enquiry. I have seen his note which has been printed in the paper book and see no reason to suppose that the Officer did not act to the best of his judgment. His note contains sufficient details to enable me to see that the assessment was according to the rules of reason and justice and not arbitrary, vague and whimsical. In my opinion therefore in the facts and circumstances of the case the assessment was to the best of the judgment of the Income-tax Officer and the question should be answered accordingly.

Amulya Chander Sen, for the Assessees.

N. N. Sircar (Advocate-General) and *Radhabinod Pal*, for the Crown.

JUDGMENT.

RANKIN C. J. :—In this case the Commissioner of Income-tax in the end has referred to this Court the following question only:—"The Income-tax Officer simply puts 'Business Rs. 30,000'. No basis or details are apparent. Can this be an assessment 'to the best of one's judgment"? In my opinion, the answer to this question is—yes, and the assessees should pay the costs of this Reference.

GHOSE J. :—I agree.

BUCKLAND J. :—I agree.

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(440) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Jackson, Additional Judicial Commissioner.

(2nd March, 1931.)

Ibrahimbhai Mulla Badruddin .. *Assessee*

vs.

The Commissioner of Income-tax, Central Provinces and Berar.

Indian Income-tax Act (XI of 1922) Sec. 66 (3)—Ginning Factory—Baling expenditure—Decision based on Officer's personal experience—No question of law for a case.

Where on an assessment of the profits of a ginning factory, the Income-tax Officer acting on his personal experience of expenditure in other factories allowed expenditure for baling cotton at a rate lower than that claimed,

HELD, that there was no question of law for stating a case to the High Court.

Application [Miscellaneous Judicial Case No. 71 of 1930] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Central Provinces and Berar to state a case for the opinion of the Court.

M. R. Phatak, for the Assessee.

JUDGMENT.

This is an application under section 66 (3) of the Income-tax Act asking that the Commissioner of Income-tax be required to state a case and refer it to this Court.

2. Six grounds have been given for the application. They have all been considered in the order of the Commissioner in which he refused to state a case and I agree with him that no question of law is involved. The only one that appears to involve a question of law is No. 2 which runs to the effect that the Income-tax Officer erred in law in basing his decision on a statement made by some other person in some other case in which the assessee had no opportunity to cross-examine him. This refers to the disallowance of Rs. 1,479 in the expenditure shown as incurred in baling cotton. The assessee claimed at Rs. 1-4-0 per *palla* but the assessing officer allowed only 0-14-0. It does not appear, however, that in doing this the assessing officer based his decision on the evidence of a witness examined in another case but on his personal experience of what rate of expenditure was as incurred by other factories.

3. I see no ground for calling upon the Commissioner to state a case and I dismiss the application.

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(441) IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Mr. Justice Sir C. C. Ghose, Kt., and Mr. Justice Buckland.

(6th March, 1931.)

Binjraj Hukumchand .. *Assessee*

vs.

The Commissioner of Income-tax, Bengal *Referring Officer*

Indian Income-tax Act (XI of 1922), Secs. 10 (2) and 66 (2)—Bad debts, claim for—Burden of proof—Disallowance as not proved—Reference to High Court—Assessee, if entitled to produce fresh evidence.

Where an assessee whose transactions of the account year show a profit of a certain amount wants to deduct therefrom certain sums as bad debts

the burden is on him to produce satisfactory evidence (1) of the nature and character of the debts, (2) that they were really and justly due to him and (3) that they became bad in the account year.

Where the debt claimed to be set off was an old unsecured one, the bulk of it being due from about 1920, in respect of which no interest was entered in the accounts since 1923 and nothing was paid to or by the debtor in the account year 1927-28, when credit was given for a part of the debt by debiting it against one of the partners of the assessee firm to whom the debtor had executed a mortgage and the balance written off

HELD, that there was no error of law in the disallowance of the claim by the Income-tax authorities on the ground that the debt was not proved to have become bad in the account year.

It is not open to an assessee to ask the High Court on a case stated under Sec. 66 (2) of the Income-tax Act to examine his account books and to come to findings of fact contrary to those arrived at by the Commissioner.

Case stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal for the opinion of the High Court.

CASE.

The questions of law, hereinafter stated, which are being referred for the decision of the Hon'ble High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922) arise out of the assessment, for the year of assessment 1928-29, of Messrs. Binjraj Hukumchand, a registered firm, hereinafter referred to as "the Assessees."

2. The facts are as follows:—

The Assessees are bankers and moneylenders and also do business in the import and retail sale of piecegoods. The partners of the firm are Jaskaram and Mohanlal. The books of the previous year viz., 1984 Ramnavami, upon the profits of which the assessment was made, contained an account in the name of "Tarachand Prithwiraj Singhee." In that account were the following entries:—

	Rs.	A.	P
Tarachand Prithwiraj	81,658	6	0
Kissenchand Tarachand	2,431	0	3
Tarachand Singhee	6,909	2	6
Total due	90,998	8	9
Settled at	29,999	7	9
Balance written off	60,999	1	0

Against the credit Rs. 29,999-7-9 there was a debit of the same amount in the account Hukumchand Baid Ratangarh (capital account). The sum was transferred to the Ratangarh (Bikanir) accounts of the firm by credit in the account Binjraj Hukumchand Calcuttawallah and debit in the account of Mohanlal, one of the partners.

3. The Assessees gave the following explanation of these entries to the Income-tax Officer. Formerly their firm was a partner to the extent of four annas in a jute business. The other partners were Tarachand and Padamchand Chozemull. This business was closed down in 1977 Ramnavami, seven years before the previous year, after incurring loss. Tarachand was unable to meet his share of the loss and the Assessees met his liabilities as well as their own. The debt on this account was entered in their books to the debit of Tarachand and carried forward, until in the previous year, Tarachand mortgaged some property situated in Bikanir for Rs. 30,000 to Mohanlal, a partner in the firm of the Assessees, who assumed responsibility to the Assessees in that amount and the balance was thereupon written off as irrecoverable, since Tarachand had no other assets. Tarachand deceased six months after executing the mortgage. His last payment had been in 1981 Ramnavami, when he paid Rs. 1,472-13-0 and gave a note of hand for the remainder of the debt to prevent the debt from becoming irrecoverable.

4. The mortgage bond was produced before the Income-tax Officer. The following are relevant extracts—

"I, Tarachand, son of Kissenchand by caste Oswal Singhi, an inhabitant of Bidasar in the Parganah of Sujangarh in the State of Bikanir Raj. Whereas there have been three accounts with the firm of Binjraj Hookumchand of Calcutta, namely (1) the account in the name of Tarachand Singhi for the miscellaneous expenses showing a debit balance of Rs. 6,909-2-6, (2) the account in the name of Tarachand Pirthiraj Singhi for the profits and losses arising out of the purchase and sale of jute showing a debit balance of Rs. 81,658-14-3 and (3) the account in the name of Kissenchand Tarachand Singhi in respect of which a mortgage of immovable properties at Bidaswar in Sujangarh was executed for Rs. 14,000 in favour of Binraj Hookumchand on the 12th August 1902 and of which large sums of money were paid up and in respect of which a sum of Rs. 2,431-0-3 only remains outstanding and whereas the total debts of Rs. 90,999-1-0 of the above three accounts remained outstanding against me on Chait Sudi 8th Sambat 1981 and whereas accounts were made of these debts and hand notes for these debts were executed by me on Mangsar Badi second Sambat 1982 at Bidasar separately on one anna stamps each and whereas the present proprietors of the firm of Binjraj Hookumchand are Jaskaran son of Hookumchand Boid and Mohanlal son of Malchand Boid of Ratangarh and whereas the settlement of the debt of Rs. 90,999-1-0 for principal and interest up to date has been made with the proprietors of the firm of Binjraj Hookumchand on this date in the manner following, viz., that out of the sum of Rs. 90,999-1-0 for principal and interest the sum of Rs. 60,999-1-0 has been exempted and only the sum of Rs. 30,000 has been settled in full satisfaction to be my debt and whereas this sum of Rs. 30,000 has been accounted to the proprietors of the firm of Binjraj Hookumchand by Mohanlal son of Malchand Boid of Ratangarh the firm of Binjanj Hookumuchand will realise this sum from the said Mohanlal and I shall remain liable to Mohanlal Boid for the said sum of Rs. 30,000 for which sum Mohanlal has been accountable to the firm by me and for this sum of Rs. 30,000 of which half is Rs. 15,000 I execute this document in favour of Mohanlal and an interest of eight per cent, per mensem will accrue to this sum and I shall pay this interest on demand on the properties of the debtor which are mortgaged hereby for his satisfaction are as follows."

5. The Income-tax Officer called for the books showing the origin and nature of the debt, but the Assessees only produced the books of 1981 and subsequent years, in which the debt was entered as carried forward from the preceding year. No interest was credited on the debt in any of the years

between 1981 and 1984, the previous year. There is nothing on record to show that the Income-tax officer verified whether the last payment of Rs. 1,472-13-0 referred to in paragraph 3 above found place in the books of 1981. Seemingly he omitted to make this check. The Income-tax Officer disallowed the bad debt as a set-off against profits on various grounds, including the following:—

(a) the origin and nature of the debt had not been proved;

(b) the debt was not a business debt of the firm of the Assessees, but a capital loss of the separate jute firm which incurred the loss, in which the Assessees were only four annas partners;

(c) the debt was time-barred; and

(d) the mortgage deed showed that the debtor had other properties against which the Assessees might have proceeded, so that the writing off was premature.

It will be observed that grounds *(c)* and *(d)* are mutually inconsistent. The decision of the Income-tax Officer was upheld in appeal.

6. Secondly, in the account "Netherlands Trading Society" the Assessees showed a loss of Rs. 5,000 on account of fall in the value of German marks held by them. The Income-tax Officer disallowed the loss as set off against profits, holding that the loss was a capital loss and his decision was upheld by the Assistant Commissioner in appeal. The facts in regard to this claim were not sufficiently set down in the assessment note and I therefore had an enquiry made. The facts are as follows:—

In the year 1978 Ramnavami the Assessees purchased 1,75,000 German marks through the Netherlands Trading Society for Rs. 5,000. The marks were not taken delivery of, but were kept in deposit with the Netherlands Trading Society at 3% per annum interest. In 1984, the previous year, the marks being worthless, the whole amount was written off. The books of the intervening years showed uniform debit of Rs. 5,000 brought down and credit Rs. 5,000 carried forward. The Assessees claim the transaction to have been a speculative venture. There are, however, no other instances of such speculations by the Assessees, while the fact that the Bank was to allow interest on the marks would seem to indicate that the same were intended to be held as an investment. Banks do not usually allow interest on temporary accounts. In the written application under section 66 (2) it was put forward that the loss was sustained on account of the closing down of the Netherlands Trading Society, but, in fact, that concern is still doing business. The collapse in German marks took place, as every one knows and is admitted by the Assessees, before the previous year. The marks were without value at the opening of the previous year.

7. Thirdly, the Income-tax Officer, in scrutinising the books, found that the Assessees had credited rent amounting to Rs. 575 realised from certain property in Darjeeling. This amount had not been carried to the Profit and Loss account, nor had the property been shown in Schedule A of the return, as it should have been. The sessees manifestly attempted to conceal this property from assessment. The Income-tax Officer allowed one-sixth for repairs and Rs. 199 for ground rent and assessed the balance of rent as annual value. In appeal the Assessees claimed deduction for municipal tax paid amounting to Rs. 203-4-0. The Assistant Commissioner, in disposing of the appeal, included this claim among the points which were not pressed. Probably he misunderstood the learned pleader who represented the Assessees.

8. The Assessees have required me to refer the following questions of law to the Hon'ble High Court.

(1) Whether the bad debt in the name of Tarachand Singhee was not legally written off in 1984 when settlement was arrived by the execution of the mortgage deed for Rs. 30,000 for which credit was given to the debtor.

(2) Whether the mortgage deed was rightly construed by the learned Income-tax Officer whose construction of the deed was upheld by the Assistant Commissioner in holding that the debtor had other properties against which the Assessees could proceed and that the mortgage deed was against the Assessees' claim for bad debt.

(3) Whether the learned Income-tax Officer's proposition that because a part of the debt had its origin in the losses sustained by the debtor and the debt arose out of the debtor's inability to pay his share of the losses, the debt was not a business debt and no claim can be made on it as a bad debt—has a legal foundation; how can the loss be legally claimed whether as a revenue loss or loss of capital.

(4) Whether when both the assessee who is the creditor and his debtor have treated the amount as a legitimate debt carrying interest and when the amount had been originally advanced by the assessee the learned Income-tax Officer acted legally in disallowing the claim for the bad debt.

(5) Whether the loss suffered in German Marks could not rightly be claimed as a legitimate business deduction.

(6) Whether occupier's share of Municipal tax and annual insurance premium are not legitimate allowances to be deducted in computing the income from House Property under section 9 of the Act.

9. The first four questions have reference to the bad debt in the account "Tarachand Prithwiraj Singhee". The Income-tax Officer, as explained above in paragraph 5, disallowed this bad debt for various reasons, four of which are specified in that paragraph. Of these one was that the debt was prematurely written off. Question 2 relates to this finding. I cannot uphold the finding, although I consider that the other three grounds were sufficient cause for disallowing the writing off of the bad debt. Question (2) is therefore omitted from the reference.

10. Questions (1), (3) and (4) may be resolved into one question, *viz.*, whether set off was rightly disallowed. But it is plain from the mortgage deed that, although the three accounts had been amalgamated into one account, there were still three debts, each distinct in nature, so that the above question arises in relation to each of the three debts. The questions are therefore restyled and restated for reference as follows:—

(a) In the circumstances was the Income-tax Officer right in disallowing set off against the profits of the previous year of the unrecovered balance of the debt standing in the name of Tarachand Singhee?

(b) Was he right in disallowing set off of the unrecovered balance of the debt standing in the name of Kissenchand Tarachand?

(c) Was he right in disallowing set off of the unrecovered balance of the debt standing in the name of Tarachand Prithwiraj?

11. My opinion on each of these questions is as follows:—

Question *(a)*.—This debt, as is seen from the extracts from the mortgage deed made above, was on account of miscellaneous expenses. An assessee who claims any deduction or set off against profits is under an obligation to produce evidence in support of his claim. If he fails to do so, the duty of the Income-tax Officer is to disallow the claim. In the present case it is *a priori* extremely unlikely that advances for miscellaneous expenses were business debts. The Assessees have never at any stage attempted to explain how the debt originally arose, and have failed to tender in evidence the books showing the origin and nature of the debt. This debt, in common with the other two debts, was written off consequent on the execution of the aforesaid mortgage, but no actual money was paid to the Assessees in satisfaction. One of the partners, Mohanlal, accepted the mortgage at a valuation of Rs. 30,000. He is said to have stood surety to the firm in that amount but the firm has not actually received the money. The debt may possibly have been a personal debt due to Mohanlal and not the firm. The Assessees failed to substantiate their claim before the Income-tax Officer, and, in my opinion, the answer to the question is in the affirmative, for that reason.

12. Question *(b)*.—The debt in issue in this question had evidently nothing to do with the aforesaid jute firm, since it was secured by a mortgage as far back as 1902 A. D. and the jute firm is said by the Assessees to have carried on business up to 1977 Ramnavami, some twenty years after 1902. It is moreover, unexplained why, the debt being secured by a mortgage, this security was exchanged in 1982 Ramnavami for a hand note on a one anna stamp. The origin and nature of the debt the Assessees have not attempted to explain, as it was incumbent upon them to do. The debt may have been a personal debt accruing to Mohanlal, the partner in whose name the mortgage was executed. The Assessees failed to substantiate their claim before the Income-tax Officer, and the answer to Question *(b)* is in the affirmative, in my opinion.

13. In regard to Question *(c)* also the facts are not plain. The Assessees carried on business as four annas partners in a jute firm along with two other persons. This firm closed down owing to loss some seven years before the beginning of the previous year. One of the partners could not meet his share of the loss; the Assessees met his liabilities for him and charged the amount to him in their books as a debt owing to them. Such is the case of the Assessees. Whether the third partner met his own share of the liabilities has not been revealed.

14. The exact claim of the Assessees is to be inferred from Question (4) of the questions proposed by them for reference and reproduced above in paragraph 8, and is that the advance was a loan and the writing off allowable as of an irrecoverable loan. But the writing off of a loan can only be allowed as set off against profits when the loan was advanced in the course of moneylending business, strictly speaking, since only in such cases can loans be said to be of the nature of the business and the loss a true trading loss. This condition was not fulfilled in the present instance. The loan, if loan there really was, was advanced by the Assessees without proper security and with slender hope of recoupment under compulsion of saving their credit in the market. Having entered business with a partner who was

without capital, they were bound to meet his share of any loss, and they well understood that they were so bound before they entered into the partnership. Therefore this was no case of a loan properly speaking. On the facts it would appear that the loss to the Assessees in meeting their partner's liabilities was a capital loss incurred by them in their capacity of partner in the jute firm, which was a separate entity for purposes of assessment. There is also the consideration referred to above that the aforesaid mortgage deed was executed in favour of one of the partners only in the firm of the Assessees, from which a suspicion arises that the debt may have been a debt owing to this partner personally. Unless the books of the said jute firm or the original entry in the books of the Assessees is seen, it cannot be said to be beyond all doubt that the Assessees were the partners in that firm and not Mohanlal only. In any case the Assessees failed to prove before the Income-tax Officer the origin and nature of the bad debt or irrecoverable loan. In my opinion, therefore, question *(c)* should be answered in the affirmative.

15. Question (5) rests on a misstatement of fact, *viz.*, that the firm of the Netherlands Trading Society have closed down. The question is therefore renamed question *(d)* and restated for reference as follows:—

Was the loss in German marks rightly disallowed?

16. My opinion on this question is as follows. On the facts stated above in paragraph 6 it would appear that the marks were bought as an investment. Even if they were not so bought, the loss was not a loss appertaining to or incurred in the previous year. The method of accountancy followed was not correct. The value of the marks should have been written off when the marks became worthless, instead of their being carried forward from year to year in the books at cost price. In my opinion, therefore, the answer to the question is in the affirmative.

17. Question (6) contains two questions in one. That part of the question which refers to the insurance has a reference to a property owned by the Assessees at 22, Kalakar Street, Calcutta. The Income-tax Officer noted down the insurance charge, but inadvertently omitted to set off the same against annual value. The Assessees should have applied under section 35. They included this ground of objection in their appeal, but the Assistant Commissioner of Income-tax, probably through misunderstanding, thought that the point had been given up. I have rectified the error under section 33 and omit this part of the question from the reference. The other part of the question has reference to the aforesaid Darjeeling property. The answer to the question is in the affirmative, in my opinion, but the question does not arise out of the facts. The Assessees attempted to conceal their Darjeeling property and did not include it in Schedule A of their return. They made no claim to be allowed occupier's share of municipal taxes as deduction from annual value. The Income-tax Officer therefore could not have allowed a claim which was not made, nor could the appellate authority have admitted the claim except for special reasons recorded and that authority made no such admission of the claim. It may also be noted that in their written application under section 30, as also in their written application under section 66 (2), the Assessees claimed Rs. 203-4-0 as deduction from annual value, but this amount admittedly includes both owner's share and occupier's share of the taxes, nor have the Assessees explained what proportion of this amount appertains to the owner and what proportion to the occupier. Therefore question (6) does not arise out of the facts of the case and I do not refer it.

JUDGMENT.

RANKIN C. J. :—In this case the assessees, a registered firm, claim that in computing their profits for the Ramnavami year 1984 (1927-28) they are entitled to make a deduction of Rs. 60,999-10-0 in respect that certain debts owing to them by one Tarachand son of Kissenchand became bad to that extent in that year. The Commissioner of Income-tax has proceeded on the footing that it is for the assessees to produce satisfactory evidence (1) of the nature and character of the debts, (2) that they were really and justly due to the assessees firm and (3) that they became bad in the year of account. He has held upon the evidence that the assessees have failed to do this and he has disallowed the deduction claimed. He has referred to us the question "whether the Income-tax Officer was right in disallowing set off". As under the Income-tax Act (Sec. 66) this Court has to decide question of law only the form of the question is open to exception. I propose to enquire whether the Income-tax Commissioner was upon the evidence obliged in law to allow the deduction and whether if not he has in arriving at his decision departed from or misapplied the principles which in law govern the matter.

The debts alleged to be due from Tarachand are described in a mortgage bond dated 28th June 1927 as three in number. The oldest appears to be an account in the name of Kissenchand Tarachand Singhi in respect of which a mortgage was executed in 1902 for Rs. 14,000 and upon which in 1927 only Rs. 2,431-0-3 was outstanding. How this debt came to be incurred and what has happened to the mortgage of 1902 are questions upon which no evidence was produced. The mortgage deed is not produced. It appears from the assessees' books of 1924 (R. 1981) that a sum of Rs. 1472-13-0 was brought to Tarachand's credit in this account in that year. The second debt is given as an account in the name of Tarachand Singhi for Rs. 6909-2-6 for "miscellaneous expenses." The dates and particulars of these alleged expenses and the circumstances in which the assessees firm came to be entitled to claim these expenses are not to be found in any books of account or other document produced. The third debt is by far the largest. It is given as Rs. 81,685-14-3 and is described in the mortgage "bond as being" for profits and losses arising out of the "purchase and sale of jute" and the account is said to stand in the name of Tarachand Pirthiraj Singhi. To the Income-tax Authorities an explanation has been given to the effect that the assessees were formerly partners in a jute business with Tarachand and another, the assessees having a four annas share; that this business was closed down in 1920 (Ramnavami 1977) owing to losses, that Tarachand did not pay his share of the losses, which were met by the assessees and that the sum of Rs. 81,685 was due from him to the assessees accordingly.

The mortgage bond states that the amounts therein mentioned—viz: 6,909—2—6; 2,431—0—3; 81,658—14—3 and 90,999—1—0 were settled and adjusted with Tarachand in 1924 (R. 1981) who gave handnotes for each debt. It describes the sum of Rs. 90,999—1—0 as being due for principal and interest. It then goes on to effect a "settlement" as follows. The assessee firm gives up all save Rs. 30,000; it is to receive this sum of Rs. 30,000 from Mohanlal one of the two partners in the assessee firm; Mohanlal takes a mortgage for Rs. 30,000 at six per cent upon Tarachand's interest in certain property in Bikanir.

The assessee firm produced their books for the years 1923-7 (R. 1981-4). The sums claimed are entered as carried forward from the previous year. No payment is recorded. No charge for interest is entered. In 1984

cross entries are made debiting an account Hukumchand Baid Ratnagarh (in effect debiting Mohanlal's capital account) crediting Tarachand with Rs. 30,000 and writing off 60,999—1—0 as no longer recoverable.

Before the Commissioner of Income-tax and before us it was convended that as the business of the assessee firm, like many Marwari businesses, includes money lending, the Income-tax authorities ought to treat these debts as loans made by them to Tarachand in the course of their moneylending business, that as Tarachand (who is said to have died about six months after making the mortgage of 1927) had always acknowledged liability there was nothing further to be enquired into. I cannot accept this argument. The mortgage bond of 1927 speaks of three debts and the main one is described not as a loan but as an account "for the profits and losses arising out of the sale of jute". This means an account between partners and the Income-tax authorities have to ask themselves whether if in 1927 the assessee firm make a profit of a certain amount in their money lending business they can be allowed to say that because in another business—a jute business with at least four partners—Tarachand since 1920 has owed them money on capital account this debt can be deducted from the profit of the assessee firm in 1927, assuming that in 1927 it became a bad debt. To put the matter in another way suppose that in 1924 Tarachand had paid up his share of losses in the old jute firm with interest at six per cent could the Income-tax authorities merely on the materials now disclosed have insisted on reckoning this as part of the profits of this registered firm's money lending business. I do not think they could. Of course if the assessee firm had got out annual balance sheets of their money lending business and it appeared that in previous years the sum on Tarachand's account had been brought into the account so that interest thereon, although unpaid had been treated as an outstanding and gone to swell the profits on which income-tax was payable, the case would have been different. But nothing of the sort is shown. From 1923 onwards no interest was charged even in the assessees' books and if it be true that it was charged in earlier years this is no sufficient evidence of a loan made to Tarachand by the assessee firm in the course of its money lending business.

Again in a case like the present the assessees cannot be allowed to pick and choose the year in which they will treat a debt as bad. We have been told that a business has been carried on in the name of Binjraj Hukumchand for very many years, that at first it was a joint family business, then a contractual partnership assessed as an unregistered firm, and that it became a registered firm in the year of assessment with which we are concerned. Doubtless if they may go back for over twenty years the assessees will be able to trace many debts that are not now recoverable. But they must have solid reason for writing them off against a particular year. They cannot arbitrarily set them off against a particular year of profit. How then does the case stand from this point of view? The debt was a large one the bulk of it being due from about 1920, and it was unsecured. From 1923 interest had not even been entered in the account. In 1927 nothing was paid to or by Tarachand. All that happens is that Mohanlal one of the assessees takes a mortgage of a certain property from Tarachand. The mortgage sum is Rs. 30,000. This sum is credited against the debt. Cross entries are made in Mohanlal's account. As proof that the debt became bad in 1927 this seems to me poor and the Income-tax authorities did well to be suspicious of it.

I cannot discern any error of law in the view taken by the Commissioner. When as in this case an assessee produces his books for the year of account and complies with any other requirements as to specific documents

so that he is assessed in the ordinary way under section 23 (3) and not as being in default, the Income-tax authorities cannot assess him upon any figure of profits not warranted by evidence which they have before them; but where transactions for the year show a profit of a certain amount and the assessee wants to deduct therefrom a certain sum as a bad debt, I am of opinion that the burden of proof is upon him. If the debt which he claims to set off is an old debt still he must prove his claim to set it off. It is clear on the authorities that a claim to any of the allowances mentioned in section 10 (2) of the Act is a claim which the assessee must prove *Rowntree & Co. v. Curtis*[1] *Nope Chand Mangniram* v. *The Commissioner of Income-tax Bihar and Orissa*,[2] the same is true of a claim to deduct a bad debt and *Puran Mal v. The Commissioner of Income-tax, Punjab.*[3]

The assessees have in this case asked us to receive in evidence certain copies of accounts said to appear in books of account which were not produced to the Income-tax authorities at any stage. They ask us on the basis of these extracts to revise the Commissioner's decision upon the facts and to say that we are satisfied that the claim is made out. This shows an utter misconception of the procedure applicable to a reference under section 66 of the Act. It is not open to any assessee to ask this Court upon such a reference to examine his books of account and come to findings of fact contrary to those arrived at by the Commissioner in the case stated. Still less it is intended that this Court should be a last resort for the production of books which were not produced before any one of the three Income-tax authorities which had to deal with the case.

The assessees have suggested before us that they have had insufficient opportunity to produce or insufficient warning as to the need to produce evidence as to the origin of these debts, their nature and character and the fact that they became bad in 1927. The Commissioner has referred no such question to us, and I find from the assessees' petition before Commissioner, which they have asked us to look at, that they raised no such question before him. Further the Commissioner has at the request of the assessees annexed to the case stated a copy of the assessment note and the order sheet of the Income-tax Officer. These show that the assessees have had repeated warning of the necessity for giving proof of the origin of the debts and of the date on which they became bad.

In my opinion the question propounded to us must be answered in the affirmative and against the assessees and they must pay the costs of the reference.

GHOSE J:—I agree.

FUCKLAND J:—I agree.

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(1) 8 Tax Cas. 678 at p. 696.
(2) 2 I. T. C. 146 at p. 152.
(3) 2 I. T. C. 236.

(442) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Justice Sir Alan Broadway Kt., and Mr. Justice Johnstone.

(12th March, 1931.)

Karam Chand .. *Assessee*

vs.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces. .. *Referring Officer*

Indian Income-tax Act (XI of 1922) Secs. 25—A and 30 (1)—Assessment as Hindu joint family—Claim of dissolution not raised before the Income-tax Officer—Plea, if entertainable in appeal.

An assessee served with a notice under Sec. 22 (2) of the Income-tax Act as head of a Hindu joint family and assessed as such, is not entitled in the appeal against the assessment to call upon the Assistant Commissioner to go into the question of dissolution of the joint family not raised before the Income-tax Officer under Sec. 25—A of the Income-tax Act, the entertainment of such a plea by the Assistant Commissioner being barred under the provisions of Sec. 30 (1) of the Act.

Case [Civil Reference No. 29 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab for the opinion of the High Court.

CASE.

In a combined application under Secs. 33 and 66 (2) of the Income-tax Act (XI of 1922) I am asked to review the assessment of the petitioner for the year 1928-29, or in the alternative to refer to the High Court for decision under Sec. 66 (2) the following points said to arise out of the order passed by the Assistant Commissioner of Income-tax under Sec. 31 of the Act:—

(1) Whether the fact that at the time of making the assessment for the year 1928-29 the question regarding the dissolution of the joint family was not raised before the Income-tax Officer debarred the petitioner from raising the point in appeal;

(2) Whether in view of the fact that the previous record showed that the petitioner had been strenuously contending for several years past that he, his brother and nephews did not constitute a Hindu undivided family, the Assistant Commissioner was legally right in stating that the point was not raised before the Income-tax Officer;

(3) whether the Assistant Commissioner could refuse to adjudicate on the law point raised in the appeal in respect to the claim of partition of the Hindu undivided family;

(4) whether there was any legal bar to the Assistant Commissioner entertaining the plea and giving his finding on it; and

(5) whether in view of the fact that a suit for partition had been filed in 1926-27, the accounting period being 1927-28, the family could be assessed as a Hindu undivided family for the year 1928-29.

Having refused to review the case under Sec. 33 I proposed to refer the points of law that arise out of the order under Sec. 31 for the decision of the Hon'ble Judges under Sec. 66 (2) of the Income-tax Act.

2. **Facts of the case**—The facts are that R. B. Karam Chand, Banker and House Proprietor of Peshawar City, along with his brother and nephews has been assessed as a Hindu undivided family. A notice was issued under Sec. 22 (2) to R. B. Karam Chand, as head of the family, calling upon him to make a return of the total income during the previous year. That notice was complied with as also were the subsequent notices issued under Secs. 22 (4) and 23 (2) and after examining the accounts of the Hindu undivided family the Income-tax Officer made an assessment upon the family on a taxable income of Rs. 1,41,057. The assessee attacked this assessment in appeal and one of the grounds raised was that the joint family had dissolved since a suit for partition had been instituted in 1926-27. The Assistant Commissioner held that the assessment had in the previous years been made on the Hindu undivided family and that as the point was not raised at the time of assessment before the Income-tax Officer it could not be considered in appeal. The appeal, so far as this point was concerned, was consequently rejected. It will be observed that Sec. 66 (2) contemplates a reference only on questions of law arising out of an order under Sec. 31 and the Assistant Commissioner cannot refer any question of fact emerging from such an order. Point (2) involves a question of fact, viz., whether the matter was or was not raised in the assessment for the year 1928-29, and consequently this point cannot be referred.. I may remark however that I am satisfied that it was not raised in that assessment whatever may have happened previously. Point (5) cannot be said to emerge from the order passed under Sec. 31 since the only question before the Assistant Commissioner was whether he could entertain an appeal against a point not raised before the assessing officer. I do not therefore consider it necessary to refer this point. With these observations I shall prcoeed to record my opinion on the remaining points.

3. **Opinion of the Commissioner**—The remaining points, viz., (1), (3) and (4) are more or less the same, and I propose to deal with them together. Sec.. 25—A of the Income-tax Act prescribes that "where at the time of making an assessment under Sec. 23 it is claimed by or on behalf of any member of a Hindu undivided family hitherto assessed as undivided that a partition has taken place among the members of such family the Income-tax Officer shall make such enquiry thereinto as he thinks fit". When no such claim is made the Income-tax Officer cannot be expected to make the enquiry contemplated by the section, much less can he be expected to presume partition. The section can only apply if a member of a Hindu undivided family *claims* at the time of assessment that it has become divided If no such claim is preferred the family has to be assessed as undivided though it may have divided and the Income-tax Officer has no authority to act under the section. This is made clear by the addition made to Sec. 25—A by Sec. 3 (b) of the Second Amendment Act of 1930, which says that "where such an order has not been passed in respect of a Hindu undivided family hitherto assessed as undivided, such family shall be deemed for the puroses of this Act to continue to be a Hindu undivided family." As to whether the Assistant Commissioner is bound to consider in appeal a point not raised before the Income-tax Officer, we have to turn to the provisions of Sec. 30 (1) of the Act which runs as follows:—"Any assessee objecting to the amount or rate at which he has been assessed under Sec. 23 or Sec. 27 or denying his liability to be assessed under this Act, or objecting to a refusal by an Income-tax Officer to make a fresh assessment under Sec. 27, or to any order against him under

sub-section (2) of Sec. 25 or Sec. 25—A or Sec. 28 made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order". In deciding an appeal an Assistant Commissioner is ordinarily expected to consider whether from the record the Income-tax Officer was justified in his finding. Since the point was not raised before the Income-tax Officer no finding or order was or could be given on it by the Assistant Commissioner, because it did not arise out of the assessment, as no order was passed by the assessing officer under Sec. 25—A. The Assistant Commissioner could not admit a fresh point raised for the first time before him in appeal against the assessment. I am therefore of opinion that the Assistant Commissioner was justified in rejecting the appeal on this point on the ground that it was not raised before the Income-tax Officer.

I would accordingly answer the three questions in the affirmative.

Achhru Ram for *Badri Das* for the Assessee.

Rambir Chand Soni, for *J. N. Aggarwal* for the Crown.

JUDGMENT.

BROADWAY J.:—This is a reference by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces under section 66 (2) of the Income-tax Act, (XI of 1922). It has been made in the following circumstances:

There was a joint Hindu family in the Peshawar City which carries on the work of bankers and owns certain house property. The head of this family was Rai Bahadur Karam Chand who has brothers and nephews. A notice was issued to Rai Bahadur Karam Chand as head of the family under section 22 (2) of the Income-tax Act calling upon him to make a return of his income during the accounting period of 1927-28. He complied with the notice and all subsequent notices and was assessed on a taxable income of Rs. 1,41,057. Against this assessment he preferred an appeal to the Assistant Commissioner and one of the grounds raised before that Officer was that the joint family had been dissolved owing to the fact that a suit for partition had been instituted in 1926-27. This suit, it appears, was then pending and the property of the joint family had not been partitioned. The Assistant Commissioner in dealing with the appeal held that inasmuch as this particular objection had not been raised before the Income-tax Officer, it could not be raised before him in appeal and that therefore he could not decide it. Rai Bahadur Karam Chand then moved the Commissioner of Income-tax making a joint application under sections 33 and 66 (2) of the Income-tax Act. The Income-tax Commissioner declined to act under section 33 but referred the following questions to this Court:—

(1) Whether the fact that at the time of making the assessment for the year 1928-29 the question regarding the dissolution of the joint family was not raised before the Income-tax Officer debarred the petitioner from raising the point in appeal.

(2) Whether the Assistant Commissioner could refuse to adjudicate on the law point raised in the appeal in respect to the claim of partition of the Hindu undivided family.

(3) Whether there was any legal bar to the Assistant Commissioner entertaining the plea and giving his finding on it.

After making this reference the Income-tax Commissioner has, as required by law, recorded his opinion on the questions referred and has answered the questions against the petitioner. The objection which the petitioner made in his appeal to the Assistant Commissioner ought to have been taken by him before the Income-tax Officer under section 25—A of the Income-tax Act. Had such an objection been taken, it would have been incumbent on the Income-tax Officer to make such enquiry as he thought fit and to pass an order under that section if he found that the requirements of that section had been fulfilled. If the petitioner found himself dissatisfied with the order passed by the Income-tax Officer he could prefer an appeal against that order under the provisions of section 30 (1) of the Act. What the petitioner claims to be entitled to do is to call upon the Assistant Commissioner in an appeal to him to go into a question which should have been raised before, and decided by the Income-tax Officer, on an appeal against the assessment. This appears to me to be opposed to the clear and unmistakable provisions of section 30 itself. I consider that the opinion of the Income-tax Commissioner is correct and that he has rightly held that the petitioner could not appeal to the Assistant Commissioner on the ground set out by him, inasmuch as no objection under section 25—A had been made, and that the Assistant Commissioner was right in refusing to go into the matter and further, in my opinion, the provisions of section 30 (1) barred the Assistant Commissioner from entertaining the plea. The petitioner must pay the costs of this Court.

Let the papers be returned.

JOHNSTONE J:—I agree.

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(443) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

FULL BENCH.

Before Mr. Justice Addison, Mr. Justice Tek Chand, Mr. Justice Jai Lal, Mr. Justice Dalip Singh, and Mr. Justice Agha Haidar.

(13th March, 1931).

Messers Chhunna Mal Salig Ram .. *Assessees.*

v.

The Commissioner of Income-tax, Punjab and N.W.F. Provinces .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 9 (2)—Annual value of House-property, determination of—House-tax under Punjab Municipal Act, if excluded.

On a reference to Full Bench Held, (*Addison J.,* dissentiente) *The 'annual value' of property under Sec. 9 of the Income-tax Act does not include sums paid by tenants to the owner on account of house tax payable by the owner to the Municipal Committee of Delhi under notification issued pursuant to the provisions of the Punjab Municipal Act III of 1911.* . . . . . .

Per Dalip Singh, J:—The 'annual value' of property is a notional amount estimated at the reasonable letting value expected to be paid from year to year, regard being had to rents paid for similar and similarly situated properties in the locality. It is always a question of fact having regard to the circumstances of the case as to the shifting of the burden of house tax by the

owner on the tenants, whether that value includes or not the Municipal house-tax.

Nawab Mahommed Akbar Khan v. *The Commissioner of Income-tax, Punjab*, 3. I.T.C. 344, Overruled.

Chhunna Mal Salig Ram v. *The Commissioner of Income-tax, Punjab*, 3. I.T.C. 465, Approved.

Case [Civil Reference No. 39 of 1929] stated under Sec. 66 (1) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. F. Provinces for the opinion of the High Court.

CASE

In accordance with the provisions of section 66 (1) of the Income-tax Act (XI of 1922), I have the honour to refer for the decision of the Hon'ble Judges of the High Court a question of law arising out of the assessment to income-tax for the year 1928-29 of Messrs. Chunna Mal Saligram of Delhi.

2. **Facts of the case:** For the assessment of the year 1928-29 the Income-tax Officer, Delhi determined the annual value of the assessee's house property to be Rs. 2,39,253. In determining the figure he did not exclude a sum of Rs. 4,931-9 which the assessee claimed should be deducted on the ground that it represented house-tax payable by him to the Delhi Municipality whch he had recovered from the tenants. The Income-tax Officer made various other deductions, in accordance with the provisions of section 9 of the Act, amounting in all to Rs. 84,516 and treated the resulting figure of Rs. 1,54,737 as the net assessable income under the head "property". The assessee appealed to the Assistant Commissioner urging that a deduction should be made on account of the municipal house-tax recovered from the tenants. The Assistant Commissioner, following the decision of the High Court relating to the assessment of this same assessee for the year 1927-28 (Civil Reference No. 34 of 1928) * accepted this contention and modified the assessment accordingly.

3. A different ruling on the very same point had however been given by the Hon'ble High Court in the case of *Nawab Major Mahomed Akbar Khan of Hoti vs. The Commissioner of Income-tax,* [1] when it was decided on a reference from the Commissioner of Income-tax, that such house-tax could not be deducted from the 'annual value' and that the amount paid by the tenants, being the sum for which the property might reasonably be expected to be let from year to year, was fairly taken as the 'annual value' for assessment to income-tax. The Assistant Commissioner rightly followed the most recent ruling of the Court, particularly as it had been elicited on a reference relating to this very case. It is however, unfortunate that the previous ruling of the Court was not brought to the attention of the Hon'ble Judges at the time when the reference was dealt with, and that the question was considered as being entirely a new one. With the utmost deference and respect to their Lordships I would request permission to obtain clear guidance for the Department on this matter, and to refer again for the decision of a Full Bench the question of law involved.

4. **Question of law referred:** That question may be formulated as follows:—"Does the annual value of the property for purposes of section 9 of the Income-tax Act (XI of 1922) include sums paid by tenants to the owner on account of municipal house tax payable by the owner?"

*Reported as *Chunna Mal Salig Ram* v. *Commissioner of Income-tax, Delhi*, 3 I. T. C. 465.

(1) 3 I. T. C. 344.

5. Opinion of the Commissioner. In my opinion the answer to this question should be given in the affirmative. By section 9 (2) of the Income-tax Act the expression "annual value" is to be "deemed to mean the sum for which the property might reasonably be expected to let from year to year". It is no doubt open to the owner, for his own convenience, to treat a part of the amount which he recovers from his tenants for the occupation of his property as payment to him for the tax which he has to pay to the municipality and the rest as rent. So long, however, as the tax is by law payable by the owner, it is the gross sum for which he may reasonably expect to let his property which determines the 'annual value' for income-tax purposes, and that annual value will therefore not be diminished by any amount which the owner has to pay as house-tax. If the tax were by law payable by the tenant, and the landlord merely acted as a collecting agent for the municipality, the position would be different. But it is submitted that the tax under section 61 (1) (a) of the Punjab Municipal Act is clearly and unequivocally imposed on the owner of the buildings and not on the occupier, and the recoveries by the owner from his tenants are not in the nature of collections on behalf of the municipality but are merely part of the amount which he receives in consideration of the occupation of his property.

Lala Badri Das, for the Assessees.

Jagan Nath Aggarwal, for the Crown.

ORDER OF REFERENCE TO FULL BENCH.

TEK CHAND and AGHA HAIDAR JJ. :—In the course of the assessment of income-tax on the petitioner firm Messrs. Chhuna Mal Salig Ram of Delhi, a question arose whether the "annual value" of their property for the purposes of section 9 of the Income-tax Act included sums paid by tenants to them on account of house-tax levied under section 61 (1) (a) of the Punjab Municipal Act. On the 22nd September, 1928, the Chief Commissioner Income-tax Department for that province, made a reference to this Court under section 66 for a decision on this point. The reference was heard by this Bench and was answered in favour of the assessee on 15th April 1929.* The identical question appears to have arisen before Zafar Ali and Addison JJ. in another case which came from the North-West Frontier Province (Civil Reference No. 39 of 1927).** In that case the learned Judges gave their decision against the assessee and in favour of the Crown on 16th January, 1929.

The Income-tax authorities, Delhi Province, had before them these conflicting decisions of this Court when the assessment on Messrs. Chhunna Mal-Salig Ram had to be made for the year 1928-29. The Commissioner has, accordingly, made a reference to this Court under section 66 (1) for an authoritative decision on the point.

Our reasons for the view which we took of the matter are given in detail in Civil Reference No. 34 of 1928 and it is not necessary to repeat them here. After reading the judgment of the other Bench in Civil Reference No. 39 of 1927, we think that this matter must be settled by a larger Bench. We accordingly refer the following question for the opinion of the Full Bench:—

"Does the "annual value" of the property for the purposes of section 9 of the Income-tax Act (XI of 1922) include sums paid by tenants to the

*Reported as *Chunna Mal Salig Ram* v. *Commissioner of Income-tax, Delhi*, 3 I. T. C. 465.

** 3 I. T. C. 344.

owner on account of house-tax levied under section 61 (1) (a) of the Punjab Municipal Act".

The papers will be laid before the learned Chief Justice for constituting a Full Bench.

OPINION OF THE FULL BENCH.

ADDISON J:—This is a reference by the Commissioner of Income-tax for the Punjab, North-West Frontier and Delhi Provinces, the question formulated by him being:—"Does the 'annual value' of the property for purposes of section 9 of the Income-tax Act (XI of 1922) include sums paid by tenants to the owner on account of Municipal house tax payable by the owner?"

For the assessment of the year 1928-29 the Income-tax Officer, Delhi, determined the annual value of the assessee's house property to be Rs. 2,39,253. In coming to this figure he did not exclude a sum of Rs. 4,931-9-0 which the assessee claimed should be deducted on the ground that it represented house tax payable by him to the Delhi Municipality which he had recovered from the tenants in addition to what he called the rent. The Income-tax Officer made the various deductions allowed under section 9 of the Income-tax Act amounting in all to Rs. 84,516. He thus treated the figure of Rs. 1,54,737 as the net assessable income under the head "property". The assessee appealed to the Assistant Commissioner of Income-tax, urging that a deduction should be made on account of the sum of Rs. 4,931-9-0, representing the Municipal house tax recovered from the tenants. The Assistant Commissioner, following the decision of a Division Bench of this Court, dated the 15th April 1929 * accepted this contention. The matter then came before the Commissioner of Income-tax who has referred the question for the decision of this Court under the provisions of section 66 (1) of the Income-tax Act, as another Division Bench of this Court came to a different conclusion on the 16th January, 1929, that is, prior to the decision of the Division Bench followed by the Assistant Commissioner of Income-tax. As the matter could not from his point of view be allowed to rest with two conflicting decisions on the point he again referred the matter and asked for an authoritative decision by a fuller Bench. He gave his opinion to the effect that the Municipal house tax was clearly and unequivocally imposed on the owner of the building and not on the occupier and therefore the recoveries of this tax by the owner from his tenants were not in the nature of collections on behalf of the Municipality but were merely part of the amount which he received in consideration of the occupation of his property. He pointed out that it was the gross sum for which the owner might reasonably expect to let his property which determined the annual value for income-tax purposes under section 9 of the Act and that annual value would not therefore be diminished by any amount which the owner had to pay as house tax unless this was specifically allowed by the Income-tax Act.

I was one of the Judges who gave the decision dated the 16th January 1929. Only a brief judgment was delivered by us as no convincing arguments had been addressed to us and the question appeared to us to be clear and to admit of no doubt. What was said was that the annual value of a house was the sum for which the property might reasonably be expected to let from year to year, that the tenants were paying what had been assessed as the annual value and that that was the sum for which the property might reasonably be expected to let from year to year. I shall refer to the other judgment later.

*Reported as *Chunna Mal Salig Ram* v. *Commissioner of Income-tax*, Delhi; 3 I. T. C. 465.

Under the provisions of section 6 of the Income-tax Act certain head of income, profits and gains are chargeable to income-tax in the manner enacted thereinafter. These heads are:—"Salaries, Interest on securities; Property; Business; Professional earnings and other sources." Section 7 of the Act provides for the taxation of salaries; section 8 for the taxation of interest on securities; section 9 for taxation under the head "property"; section 10 for taxation under the head "business"; section 11 for taxation under the head "professional earnings" and section 12 for taxation under the head "other sources". These various sections allow certain deductions to be made from the gross income and I do not think that there is any dispute that it is the case that only these allowances are permissible. We are concerned with section 9 which states that "the tax shall be payable by an assessee under the head 'property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner other than such portions of such property as he may occupy for the purposes of his business", subject to certain allowances, seven in number. Sub section (2) of section 9 enacts that "for the purposes of this section the expression 'annual value' shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year". The words *bona fide* in sub-section (1) are thus otiose, the *bona fide* annual value being defined in sub-section (2). No allowance is made in the section for Municipal house tax, and the question before us is whether the expression 'annual value" includes everything that the owner collects from his tenants or whether he is entitled to deduct from that sum what he pays for house tax to the Municipality, although the section itself does not give this allowance; in other words, can the owner divide into two portions what he collects from the tenants and call one portion "rent" and the other portion "house tax", and is the annual value only the portion which he calls "rent". The point for decision still seems to me to admit of no argument and, in my judgment, it must be held that the annual value must be taken to be what the tenants are consistently paying to the landlord, that figure representing the sum for which the property might reasonably be expected to let from year to year.

A reference to section 10 of the Income-tax Act will, in my opinion, show that the Legislature deliberately made no allowance under section 9 for the Municipal house tax payable by the owner, whereas such an allowance was made in the case of taxation under the head "business" under section 10. Section 10 (2) (viii) lays down that the profits or gains from business shall be computed after making the following allowance, namely, "any sums paid on account of land revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purpose of the business". Indeed, section 9 also excludes from taxation under that section such portions of the owner's property as he occupies for the purposes of his business. There is also a proviso to section 10 to the effect that "nothing in clause (viii) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or assessed at a proportion of or otherwise on the basis of any such profits or gains". In the case of business premises therefore it follows that a deduction has to be made under section 10 (2) (viii) for any sum paid on account of municipal taxes for such part of the premises as are used for the purposes of the business, provided that the tax is one on the property and not levied on the profits or gains of the business or assessed at a proportion of the profits or gains of the business. It seems to me that this conclusively establishes the intention of the Legislature to give no allowance for house tax payable by the owner under section 9, whereas such an allowance is expressly given under section 10 for premises used for the purposes of a business.

It is necessary to go to the Punjab Municipal Act under which the assessment of house tax is made to see the nature of that tax. By Sec. (3) (1) (b) of that Act "annual value" means, in the case of any house or building, the gross annual rent at which such house or building together with its appurtenances and any furniture that may be let for use and enjoyment therewith, may reasonably be expected to let from year to year, subject to certain deductions, three in number. This definition is not dissimilar from that of "annual value" given in section 9 (2) of the Income-tax Act. There is however Explanation II to Sec. 3 of the Punjab Municipal Act to the effect that the term 'gross annual rent' shall not include any tax payable by the owner in respect of which the owner and tenant have agreed that it shall be paid by the tenant.

Now under section 61 (1) of the Municipal Act the tax on buildings and lands is expressly enacted to be payable by the owner. It is further enacted by section 80 (3) of the Municipal Act that the amount of every arrear of tax, besides being recoverable in any other manner provided by that Act, shall be a first charge on the property in respect of which it is payable, and shall be recoverable, on application made in this behalf by the Committee to the Collector, as if the property were an estate assessed to land revenue and the arrear were an arrear of such revenue due thereon. Section 80 (4) enacts that if any tax or sum leviable under the Municipal Act from the owner is recovered from the occupier, such occupier shall, in the absence of any contract to the contrary, be entitled to recover the same from the owner and may deduct the same from the rent then or thereafter due by him to the owner. Section 81 of the Municipal Act might also be read. All this shows that if there is no contract between a tenant and the owner, the tenant can cut the house tax, if he pays it, from the rent and can also sue the owner for it. It further shows that an arrear of house tax is a first charge on the property and can be recovered by sale of the property under the Land Revenue Act. In spite, therefore, of Explanation II to section 3, it follows that this tax is a tax on the owner and that the owner is not a mere conduit pipe for the collection of the tax from the tenant.

In fact Explanation II to section 3 of the Punjab Municipal Act was only enacted after 1910. Before that time a custom had sprung up in Simla by which the assessment of house tax was made, not on the full amount collected by the owner from the tenant, but on that amount minus the house tax. This question, however, came before a Division Bench of the Punjab Chief Court in 1910 (46 P. R. 1910) and it was decided that where municipal taxes on a house at Simla payable by the landlord were by contract between the landlord and tenant payable by the latter to the former as part of the consideration for occupation, the sum so payable must be included in assessing the gross annual rent or annual value at which the Municipal Committee was entitled to levy the house tax. It was after this decision that Explanation II to section 3 was enacted and thereafter for the purposes of the Punjab Municipal Act, gross annual value did not include house tax if there was a contract between the owner and the tenant that it should be paid by the tenant. This enactment, however, is only a provincial enactment and does not affect in any way the Income-tax Act as passed by the Central Legislature. The authority in question also shows that the view of the Bench in 1910 was the same as that taken by Zafar Ali J. and myself on the 16th January, 1929. There is no escape from the conclusion that the sum for which the property may reasonably be expected to let from year to year is the whole amount which the landlord is able to collect from the tenant, including the house tax, although for the purposes of the Punjab Municipal Act the house tax may now be deducted by special enactment.

Pullen v. St. Saviour's Union,[1] is an analogous decision under the Valuation of Property (Metropolis) Act, 1869. In that case the owner of a block of artizan's dwellings, consisting of separate tenements, the access to which was by means of a common stair, let the tenements upon the terms of the tenants paying a certain weekly sum by way of rent, and also a further sum for the lighting and cleaning of the common stair and it was held that for the purpose of arriving at the gross value of the tenements under the Valuation of Property (Metropolis) Act, 1869, the sum paid for lighting and cleaning the stair must be added to the rent reserved. In section 4 of the Valuation of Property (Metropolis) Act the term 'gross value" was defined to mean the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenants rates and taxes, and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. It is true that this definition is not quite the same as that given in section 9 (2) of the Income-tax Act, but the difference is negligible. For this reason the authority in question is of value in the present case. A very similar case to the English authority already quoted is reported as *Veerabadrah Iyer* v. *President, Corporation of Madras.*[2]

The Income-tax instructions on this question must also be referred to, as it is settled law (see I. L. R. 43 Cal. 790) that Courts in construing a statute will give weight to the interpretation put upon it at the time of its enactment and thereafter by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. In paragraph 30 of the instructions at page 125 of the third edition, first volume, of the Income-tax Manual, the *bona fide* annual value of a building is set forth and in the beginning of paragraph 31 it is particularly noted that as stated in paragraph 53, no deductions are permissible on account of any municipal or local rates or taxes *in respect of property.* In paragraph 53 of the instructions this principle is again laid down and the distinction between property taxable under section 9 and property used for the purposes of business taxable under section 10 is set forth. No cogent or persuasive reason has been mentioned before us why this interpretation should be rejected. I have indeed tried to show that there is no escape from the conclusion that municipal house tax cannot be deducted by the landlord under section 9 of the Income-tax Act when recovered by him from the tenant. It may be the case that the Law of Income-tax in India by Sundaram is not yet a standard book of reference, but it may be mentioned that in the second edition of that work at the bottom of page 462 the opinion of the author is given to the effect that local rates or taxes cannot be allowed as deductions under section 9.

It is necessary for me to refer briefly to the judgment of the other Division Bench given on the 15th April 1929. I have been unable to follow the reasoning in that judgment and I am not sure that I understand the *ratio decidendi.* It was said in it that the question must be decided in accordance with the provisions of the Income-tax Act, but if I understand the judgment correctly the decision really turns on the interpretation of the Punjab Municipal Act. Apparently it was held that the house tax imposed by the Muni-

(1) L. R. (1900) I. Q. B. 138.

(2) (1916) 35 Ind. Cas. 589.

cipal Committee was a liability imposed upon the landlord to collect the tax from the tenant and to pay it into the coffers of the Municipality. I have tried to show that this conclusion cannot reasonably be arrived at. I have also tried to show that even if this be taken to be the case the annual value, according to the Income-tax Act, will still remain what the landlord is reasonably able to collect from the tenant from year to year. In another portion of this judgment appear the following words:—"The question for decision is whether the house tax which has been imposed by the Municipal Committee, Delhi is included in the expression 'annual value', that is to say, whether the assessee is liable to pay an increased income-tax because the Municipal Committee has imposed the house tax on him under the provisions of section 61 (1) (a) of the Municipal Act". It is obvious that this is the wrong way of stating the problem. It is not the case that the assessee becomes liable to pay an increased income-tax because the Municipality has imposed a house tax in the city. The question remains what it was before the house tax was imposed, namely, what is the sum for which the property might reasonably be expected to let from year to year. In this judgment some importance appears to have been attached to the fact that the Municipal Committee gives remission of the house tax to the owner if a house remains unoccupied for a period exceeding two months. The conclusion from this seems to have been that it was a tenant's tax in spite of the clear language of the Act. Here again I think the reasoning is unsound, for no tenant clearly is liable to pay for the initial period of two months for which the property remains unoccupied.

Before us the only argument put forward was that it was a tenant's tax because it was paid by the tenant in spite of the language of the Act and that therefore it could not be included in the annual value of the property as the landlord merely collected it from the tenant for the Municipality. The learned counsel was unable to carry his case further than this.

It will be apparent from the above discussion that the question is in reality one of fact and not of law, namely what as a fact is the sum for which the property might reasonably be expected to let from year to year. It is clear from the reference that the landlord is collecting from his tenants from year to year what he calls rents as well as the house taxes for which the landlord is liable. Surely it is a proper conclusion to be drawn by the Income-tax Commissioner that the property might reasonably be expected to let from year to year for the total of these two sums, which are being paid as a fact from year to year by the tenants. It would be no argument (nor was it advanced) that, if the house tax was abolished in any year, the landlord would not be able under his agreement to recover it from his tenant for that year. The question is still the same, what is the sum for which the property may reasonably be expected to let from year to year. Surely the answer remains the same, namely, what the landlord has been able to collect for the past years is a fair measure of what the property may reasonably be expected to let for from year to year. These considerations alone are sufficient to dispose of the reference, there being no question of law before the Court.

If, however, the question is treated as one of law, for the reasons given I have no hesitation in saying that the question propounded by the Income-tax Commissioner must be answered in the affirmative. In my judgment, the opposite view is not even arguable. It is not for this Court to legislate when an enactment is clear, whatever may be the opinion of the Court as to the justice of that enactment. It is for the legislature to make the allowance in question if it so desires and not for this Court to do so.

TEK CHAND, J.:—The admitted facts of the case which has given rise to this reference are as follows:—

The firm of Messrs. Chhunna Mal-Salig Ram owns considerable house property situate within the municipal limits of Delhi. In the course of the assessment of income-tax for the year 1927-28 the firm claimed that in calculating its assessable income under the head property the amount of the house tax levid by the local Municipal Committee under Notification No. 590 dated 16th December, 1901, which the firm had recovered from its tenants and paid to the Committee, should be excluded. The Income-tax Officer and the Assistant Commissioner disallowed this claim, but on a petition filed by the assessee under section 66 of the Act, the then Income-tax Commissioner referred the question to this Court* (C. R. No. 34 of 1928). The Division Bench which heard the reference disagreed with the view taken by the local income-tax authorities and held that the amount of the house-tax in dispute was not a part of the annual value of the properties in question.

While that reference was pending in the High Court, proceedings for the assessment of income-tax on this same firm of Messrs. Chhunna Mal-Salig Ram for the following year (1928-29) were started. The Income-tax Officer after allowing certain deductions, with which we are not concerned, fixed Rs. 1,54,737 as the net assessable income of the firm under the head property. This figure included the sum of Rs. 4,931-9-0 as representing the house tax which the assessee had recovered from his tenants and paid to the Municipality during the previous year. The assessee again claimed that this sum should be excluded. By the time the matter came up before the Assistant Commissioner, the decision of the High Court in Civil Reference No. 34 of 1928 relating to the assessment of the same firm for 1927-28 had been given. The Assistant Commissioner following that decision accepted the assessee's contention and reduced the assessment accordingly. The Income-tax Commissioner however, thought that the decision of the Division Bench in Civil Reference No. 34 of 1928 was in conflict with a ruling of another Division Bench of this Court in Civil Reference No. 39 of 1927 (*Major Mohomed Akbar of Hoti v. Commissioner of Income-tax*)[1] decided on the 16th of January 1929. He, therefore, made a reference to this Court "to obtain clear guidance for the Department" on the matter, suggesting at the same time that the following question might be determined by a Full Bench:—"Does the 'annual value' of the property for the purposes of section 9 of the Indian Income-tax Act (XI of 1922) include sums paid by tenants to the owner on account of Municipal house tax payable by the owner".

In the statement of the case, which the Commissioner submitted with the reference, he expressed his own opinion against the view taken in Civil Reference No. 34 of 1928. Along with the reference the Commissioner forwarded to this Court ten rent deeds for some of the properties of the assessee, which were in force during the year in question. The relevant terms of these rent deeds will be given later in this judgment. The reference was laid in the first instance before the Division Bench which had dealt with Civil Reference No. 34 of 1928 and that Bench, accepting the suggestion of the Commissioner, has referred it to the Full Bench.

Before dealing with the matter any further, I wish to make it clear that in my opinion the question, as formulated by the Commissioner, is

*Reported as *Chunna Mal Salig Ram* v. *Commissioner of Income-tax, Delhi*, 3 I. T. C. 465.

(1) 3 I. T. C. 344.

couched in too general terms, and it is not possible to give an answer, which will govern all cases in which it is sought to include in the assessable income of a house-owner the amount of Municipal house tax, which he realizes from his tenants and pays to the Municipal Committee. It seems to me that the provisions of the Municipal Act in force in a particular locality and the relevant notification under which the tax is levied have an important bearing on the decision of the question. I take it that in making this reference the Commissioner had in his mind the provisions of the Punjab Municipal Act III of 1911 and the relative notification issued thereunder by the Municipal Committee of Delhi, and I shall attempt to answer the question as so understood. On the materials before me, I am unable to say if there is any real conflict between the decisions of the two Division Benches of this Court, of which mention has been made by the Commissioner. The judgment in *Major Mohammad Akbar Khan of Hoti* v. *Commissioner of Income-tax*[1] (Civil Reference No. 39 of 1927) is very brief, consisting as it does merely of the finding that "here the tenants are paying what has been assessed as the annual value and that is the sum for which the property might reasonably be expected to let from year to year". I am not aware of the provisions of the Municipal Act or the notification under which house tax had been levied on the assessee in that case, and anything that I say in the course of this judgment will have a bearing on the decision in Civil Reference No. 39 of 1927 only if the provisions of the Municipal enactments and the notifications relating to the two cases are identical or essentially similar.

The question has primarily to be considered in reference to the provisions of the Indian Income-tax Act XI of 1922, section 9 of which reads as follows:—

(1) The tax shall be payable by an assessee under the head 'property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances:—

(Here follow seven clauses, none of which is relevant to the point before us).

(2) For the purposes of this section, the expression 'annual value' shall be deemed to mean *the sum for which the property might reasonably be expected to let from year to year.*

Along with the above, has to be considered section 61 of the Punjab Municipal Act of 1911, under which house tax is levied by the Delhi Municipal Committee. That section reads as follows:—

"Subject to any general or special orders which the local Government may make in this behalf, and to the rules, any Commitee may, from time to time, for the purposes of this Act, and in the manner directed by this Act, impose in the whole or any part of the municipality any of the following taxes, namely:—

(a) A tax, *payable by the owner*, on buildings and lands

(i) not exceeding twelve and a half per centum on the *annual value.*

(1) 3 I. T. C. 344.

For the purposes of the Municipal Act the expression annual value is defined in section 3 (1) of that Act, as follows:—

'Annual value' means

(b) in the case of any house or building the *gross annual rent* at which such house or building together with its appurtenances and any furniture that may be let for use or enjoyment therewith, *may reasonably be expected to let from year to year,* subject to the following deductions:—

Explanation (II)—The term 'gross annual rent' shall not include any tax payable by the owner in respect of which the owner and tenant have agreed that it shall be paid by the tenant.

Section 61 and section 3 (2) of the Punjab Municipal Act III of 1911 replaced section 42 of Act XX of 1891, the only alteration material for our present purposes being the addition of Explanation II, corresponding to which there was no express provision in the earlier Act.

The relevant notification under which house tax is levied within the municipal limits of Delhi is No. 590, dated the 16th December 1901, which is worded as follows:—

"It is hereby notified, that with the previous sanction of the Local Government, the Municipal Committee of Delhi, in accordance with section 45, clauses (7) and (8) of Act XX of 1891, has directed, with effect from the 1st of January 1902, the imposition of a house tax under section 42 (A) (a) (i) of the said Act at the rate of Rs. 3-2 *per cent* on the *annual rentals* of all buildings within the limits of the Delhi Municipality."

This notification was issued under the Act of 1891, but by virtue of the provisions of section 2 (2) of Act III of 1911, it is deemed to have been issued under section 61 of the latter Act and is still in force. As stated already, it is under this notification that the house tax on the properties in question has been imposed.

It will be noticed that the definitions of 'annual value' as given in the Income-tax Act and the Municipal Act are very similar, the only difference being (a) that for the word 'sum' in the former enactment we have the words 'gross annual rent' in the latter, and (b) that the *Explanation* does not exist in Act XI of 1922. The effect of this difference in phraseology will be examined in a subsequent part of the judgment. It may, however, be pointed out at once, that for the purpose of assessing 'house tax' under section 61 of the Municipal Act, the measure of the 'annual value' is the annual rent at which the house may reasonably be expected to let from year to year, and not the aggregate of such rent *plus* the house tax levied thereon. Or to put the matter in another way, the house tax is *not a part* of the 'annual value', but is assessed *on* the 'annual value' and is distinct from it. This will also be apparent from the rent deeds which have been forwarded to this Court by the Commissioner along with the reference. The first of these is a deed executed by one Dr. B. N. Deri in favour of the assessee reciting that he had taken a bungalow on Rs. 128-14-0 as *kiraya* (rent) consisting of:—

Kiraya Mahwari ..	(Monthly rent)	125|- and
	House tax	3|14|6
	Total	128|14|6

The relevant entries in the other deeds are:—

Name of tenant	Details given in the deed.		Total *Kiraya* payable.
Motu Mal ..	Monthly rent	50|-	
	House tax	1|9|-	51|9|-
Sham Sundar ..	Monthly rent	50|-	
	House tax	1|9|-	51|9|-
Gowardhan Das ..	Monthly rent	10|-	
	House tax	-|5|-	
	Water tax	2|-	12|5|-
Ghisu Ram ..	Monthly rent	10|-	
	House tax	-|5|-	
	Water tax	2|-	12|5|-
Gaya Parshad ..	Monthly rent	10|-	
	House tax	-|5|-	
	Water tax	2|-	12|5|-
Hem Raj ..	Monthly rent	50|-	
	House tax	1|9|-	51|9|-
Chhajju Mal ..	Monthly rent	70|-	
	House tax	2|3|-	72|3|-
Kanhaya Lal ..	Monthly rent	80|-	
	House tax	2|8|-	82|8|-

In the tenth deed, the rent is stated to be Rs. 50 *per mensem* exclusive of house tax. It is clear that for the purpose of assessment of Municipal house tax the 'annual value' is taken to be twelve times 125, 50, 10, 70, 80, etc., respectively, and not twelve times Rs. 128-14-6, 51-9-0, 72-3-0, or 82-8-0.

Let us now proceed to see whether for the purpose of assessment of income-tax, 'annual value' under section 9 of Act XI of 1922 is the same as above, or whether it is the aggregate of that figure and the house tax assessed thereon by the Municipal Committee at the rate specified in the notification, as is urged by the learned Commissioner. The first contention raised in support of this latter view is that the omission of Municipal house tax from the list of allowances given in section 9 is conclusive in favour of this interpretation. In my opinion this argument approaches the question from an erroneous standpoint. It is undeniable that Municipal house tax is not a permissible allowance under clauses (i) to (vii) of section 9; and if the assessee had claimed it as a 'deduction' from the *bona fide* 'annual value' of the property, the income of which has to be assessed, his claim would obviously be without substance. The argument of Mr. Badri Das, if I understood it correctly, was not that his client was entitled to deduct the amount of house tax from the 'annual value', but that the 'annual value' determined according to the definition given in clause (2) of the aforesaid section did not include the amount of house tax as levied under the notification given above. What then is the *bona fide* 'annual value', "the sum for which the property might reasonably be expected to let from year to year"? At one stage of the argument, it was urged that it is the total amount which the tenant is paying to the landlord; and that it includes everything that the owner collects, or is entitled to collect, from the occupier. After careful consideration, I am unable to accept this interpretation.

Under clause (2) of section 9, the sum actually paid or payable by the tenant to the landlord for the privilege of occupying the latter's property during a period of twelve months is not necessarily its 'annual value'. According to the true import of that clause it is a notional value, determined by ascertaining the amount which a hypothetical tenant, *bona fide* desirous of taking a lease of the premises, may be reasonably expected to pay to a willing landlord on a tenancy not for a year or a part of a year, but from year to year. As observed by Lord Justices Buckley and Kennedy in *Rex* v. *Special Commissioner of Income-tax, Ex parte Essex Hall*,[5] "'Annual value' is but an hypothetical sum arrived at in a certain manner. * * * * It is not an *actual* but a *hypothetical* sum". The object of the Legislature in adopting this definition is to give the assessing officer the power to reject the evidence of existing leases, where they do not represent the proper letting value of the premises. A lease may be collusive; the rent reserved may for various reasons be too low as, for instance, where the parties are related to each other, or where it is intended that the tenant would compensate the landlord in some other way. A well-known instance, much cited in text-books and cases under the English Rating Acts, is that of 'tied house' let by a brewer to a public house keeper on the stipulation that the latter shall buy all his liquor from the landlord. Conversely, the rent actually realised or realisable for a particular year might be exceptionally high, because an unusual event (e.g. the Coronation of His Majesty the King Emperor or an International Exhibition) was expected to take place, and fabulous rents were paid for this reason. In all these cases, the assessing authority is entitled to reject the leases and determine for himself the amount at which "the property may reasonably be expected to let from year to year." If, however, no such reason exists the assessing officer will take the leases into consideration as valuable evidence of the market value of the tenancy. This is all that the definition of 'annual value' in clause (2) of section 9 is intended to convey. The question in each case, therefore, is not what is the total amount which the landlord actually realises, or is entitled to realise, from the tenant but what is the real commercial letting value of the property; the sum at which the premises are worth to be let by the year in the open market.

The use of the expression 'annual value' as signifying the sum at which the property may reasonably be expected to let from year to year is not an innovation of the Indian Legislature. The phrase, as also the definition, have both been borrowed from the English Law where they have for a long time acquired a set meaning. See 43 Geo. III, c. 122 (the first English Income-tax Act); 6 and 7 Will, IV c. 96 (the Parochial Assessment Act), *Hayward* v. *Brinkworth Overseers*,[1] *Smith v. Birmingham Churchwardens*,[2] *London County Council* v. *Churchwardens of Erith*[3] *Poplar Assessment Committee* v. *Roberts*,[4] etc. Whether used in judicial pronouncements of the highest authority or in Taxing or Rating Statutes, the expression 'the sum at which the property may reasonably be expected to let from year to year' has been given the same meaning, even though there is a slight variation in the phraseology used. In some places 'annual value' is described as "the sum at which etc.," in others as the 'gross sum etc.'; in still others as 'the rental at which etc.,' or 'the gross rental etc'. But as pointed out by Konstam in

(1) (1864) 10 L.T. 608.
(2) 22 Q. B. D. 703.
(3) (1893) A. C. 562.
(4) (1922) 2 A. C. 93.
(5) (1911) 2 K. B. 434.

his valuable treatise on the Law of Income-tax (4th Ed. page 39) "the phrase annual value, whether in Income-tax Acts, Succession Duty Acts, or wherever else it appears in connection with rating or taxation, means the same thing" i.e., 'the sum at which the property may reasonably be expected to let from year to year'. This last phrase has been the subject of judicial interpretation by eminent Judges in England and India. In *Edmonds* v. *Eastwood*[1] Watson B. interpreted it as "the amount of profit derived from the property by the landlord as such." In *Inland Revenue* v. *Dickson's Executors,*[2] it was paraphrased as the "price commercially paid for the annual possession of the property". Similarly in India, in the *Secretary of State for India* v. *The Municipal Commissioners of the City of Madras,*[3] Chief Justice Collins held that in determining the 'annual value' what has to be ascertained is the "intrinsic value of the tenancy to the owner in its present condition". Perhaps, the most expressive phraseology employed to bring out the real meaning is that used by Sir Richard Garth in *Nandoo Lal Bose* v. *The Corporation for the Town of Calcutta*[4] where the learned Chief Justice observed that the "annual value of a house must mean the annual money benefit derivable from it" by the owner.

Now in the case before us what is the "annual money benefit" derived by the assessee from these lettings? What is the "intrinsic worth of the tenancy" to him? Is it, to take as a convenient illustration the third of the rent deeds referred to above, Rs. 50, which he retains to himself out of the Rs. 51-9-0, realised by him from the tenant, or is it the latter amount, including as it does the house tax levied on Rs. 50 by the Municipal Committee? It seems to me obvious that on the facts as given in the illustration, the "commercial value of the tenancy" or the "amount of profit derived from the property by the landlord as such" is Rs. 50 and not Rs. 51-9-0. It is quite true that it is not open to a landlord to reduce his assessable income by merely splitting into two parts the amount actually realized by him from the tenant and to describe one of these parts as "monthly rent" and the other as "house tax". But at the same time, there can be no manner of doubt that the real intrinsic worth of the tenancy to the landlord cannot be enhanced by the mere circumstance that the Municipal Committee has thought fit to levy a house-tax on the *bona fide* commercial rental of the property, and the landlord has managed to realize from the tenant the amount of such tax in addition to what he had been realizing heretofore.

The point can best be explained by an illustration relating to house property situate within the limits of a Committee like that of Lahore which does not at present levy any house-tax. Take the case of a house at Lahore which is let for Rs. 100 *per mensem*, and assume also that this sum is its *bona fide* letting value on a tenancy from year to year. The 'annual value' of such a house for the purpose of section 9 of the Income-tax Act will obviously be Rs. 1,200. Now suppose that the Municipal Committee suddenly decides to levy house tax at the rate of Rs. 5 *per cent* on the annual rental of all house property at Lahore, and the landlord makes a corresponding increase in the sum payable by the tenant, raising it from Rs. 100 to Rs. 105 *per mensem*. He thus realizes Rs. 1260 from the tenant in the course of the year, and out of the sum so realized he pays Rs. 60 as house tax to the Municipal Committee and retains Rs. 1,200 for himself as before. Can it be said that

(1) (1858) 27 L. J. Ex. 209.
(2) 14 Tax Cas. 69.
(3) (1887) 10 Mad. 38.
(4) (1885) 11 Cal. 275.

the "commercial value of the tenancy" or "the money benefit derived by the landlord from it" has, in the circumstances, increased from Rs. 1,200 to Rs. 1,260? In my judgment the question is capable of one answer and one only, that "the sum for which the property might reasonably be expected to let from year to year" is the same in either case, viz., 1,200.

Let us now examine the converse case of house property in Delhi, where house tax is levied at present. Taking once more the third rent deed referred to above as an illustration, we find that the landlord realises at present Rs. 51-9-0 *per mensem* from the tenant. Out of this sum, he pays Rs. 1-9-0 to the Municipal Committee as house tax and retains Rs. 50 for himself. Suppose the Committee were to abolish the house tax from a certain date and thenceforward the landlord ceased to realise Rs. 1-9-0 (the amount of the tax), from the tenant but recovered from him Rs. 50 *per mensem* only, which he appropriated to himself as rent as heretofore. It is obvious that in both cases the "annual money benefit derived by the landlord" from the tenancy is the same, namely Rs. 600. But if the argument for the Department is correct such benefit should be taken to have decreased by (12 x 1|9) = Rs. 18-12-0, a conclusion which is erroneous on the face of it.

Considerable stress was laid by counsel for the Department on the fact that in section 61 of the Punjab Municipal Act, it is specifically provided that the house tax is "payable by the owner", and from this it was sought to be argued that the amount of such tax must be presumed to be a part of the 'annual value' of the property. In my opinion such a conclusion is not warranted by the letter or the spirit of the Statute. It is clear that the tax is not in the nature of a fixed levy on the ownership of property, but is in reality and substance a tax on "rental" connected with and dependent upon occupation of the premises, whether by the owner himself or by a tenant under him. It seems clear to me that this provision was made with a view to provide a convenient mode for the realisation of the house tax by the Municipal Committee. There are many obvious difficulties in collecting a tax of this kind from an uncertain and fluctuating body of tenants and for this reason the Legislature has made the owner responsible for the payment of the tax. But it does not by any means follow from this that the amount of house tax has been made a part of the 'annual value' of the property.

In order to establish that the expression 'annual value' has different meanings under the Punjab Municipal Act III of 1911 and the Indian Income-tax Act, XI of 1922, Mr. Jagan Nath Aggarwal referred us to Explanation II to section 3 (2) of the former Act, which lays down that the term 'gross annual rent' shall not include any tax payable by the owner in respect of which the owner and tenant have agreed that it shall be paid by the tenant. The learned counsel strenuously maintained that the absence of a similar provision from the Income-tax Act postulated that house tax was a part of the "annual value" for the purposes of that Act. In my opinoin this argument is fallacious, and I have no hesitation in rejecting it. The Explanation was not intended to, nor did it, in fact, make any change in the interpretation of the corresponding section of the Municipal Act of 1891, which had been uniformally accepted throughout the Province, but which was over-ruled by the decision in *Fleming vs. Municipal Committee of Simla.*[1] Very soon after the judgment in that case was given, a general revision of the Municipal Act was undertaken by the Punjab Legislature and this opportunity was taken to add the Explanation to the definition of "annual value" so as to get rid of

(1) 46 P. R. 1910

the effect of that ruling and to restore the interpretation which had been universally accepted as correct for years before. It is not necessary for the purposes of this reference to make a detailed examination of *Fleming vs. Municipal Committee, Simla.* (1) The judgment in that case was based mainly, if not wholly, on *Pullen vs. St. Saviour's Union* ((1900) 1 Q. B. 138) which is a case decided under the Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67) and admittedly proceeded upon its peculiar facts. In that case the owner of a block of artizans' dwellings consisting of separate tenements, the access to which was by means of a common stair, let the tenements upon the terms of the tenants paying a certain weekly sum by way of rent and also a further sum for the lighting and cleaning of the common stair, and it was held that for the purpose of arriving at the gross value of the tenements under the Valuation of Property (Metropolis) Act, 1869, the sum paid for lighting and cleaning the staircase was, under the circumstances, a part of the rent of each of the said hereditaments. The decision really turned upon the peculiar wording of section 4 of the aforesaid Act, which defined "gross value" as meaning "the annual rent which a tenant might reasonably be expected * * * to pay * * * *if the landlord undertook* to bear * * * the expenses * * * *necessary to maintain the hereditament in a state to command that rent*", and it was found as a fact that no tenant would take a tenement in a building of this character unless the staircase by which he was to reach his tenement was kept reasonably clean and lighted. It was accordingly held that cleaning and lighting charges were a part of the "expenses which were necessary to maintain the hereditament in a state to command the rent" and, therefore, within the definition as given in section 4 above. This was the sole point decided in *Pullan's* case and I venture to think, with the utmost deference, that neither the ultimate decision nor the observations made in the course of the judgment in that case had any real bearing on the question which arose for determination before the Chief Court in *Fleming vs. The Municipal Committee, Simla.* In my opinion the argument based on the *Explanation* is without force and must be overruled.

Another case, on which reliance was placed by Mr. Jagan Nath is *Veerabhadra Iyer vs. President Corporation of Madras* (35 I. C. 589), which was decided under the Madras City Municipal Act. In that case, under the lease the tenant was to pay Rs. 20 *per mensem* as rent and to keep the garden properly watered, but if he did not want to water the garden the landlord was to pay Rs. 50 *per mensem.* The tenant chose the latter alternative, and it was held that for the purposes of municipal taxation, the gross rent should be calculated at the rate of Rs. 50 *per mensem.* The decision, however, rested principally on the fact, found by the Court, that the watering was not to benefit the tenant alone, and that if the land were not leased out, the landlord was bound to water the garden and entitled to get the usufruct. The case is obviously distinguishable and it is not necessary to discuss it at any length.

Finally, it was pointed out that in section 10-(2) (viii) of the Indian Income-tax Act it is provided that in computing the profits or gains of a business one of the permissible allowances is the sum paid on account of land revenue, local rates or municipal taxes, in respect of such part of the premises as are used for the purposes of the business. It was contended that the absence of a similar allowance from section 9 shows, and shows conclusively, that the Legislature did not intend to exclude house tax from the assessable income under the head "property". This contention, however, begs the question and is based upon the assumption that the assessee seeks

(1) 46 P. R. 1910.

to exclude municipal house tax as a statutory allowance under section 9. As has been pointed out already, this is not the case, but that what has really to be done is to determine "the sum for which the property might reasonably be expected to let from year to year". The basis of assessment under section 10 is the amount of "profits or gains" *actually* arising in the business carried on by the assessee, while in section 9 the tax is levied on "income" from property calculated on a *notional* or *hypothetical* sum, arrived at in the manner prescribed by the Legislature. In the former case the amount paid for local rates, municipal taxes, etc., could be deducted only if specific provisions were made for it in the Statute; in the latter case no such provision was necessary in view of the definition of "annual value".

Both counsel referred us to certain passages from the Indian Income-tax Manual, and claimed that they supported their respective contentions. I do not, however, think it necessary to discuss them, as the Manual merely contains departmental instructions for administering the Act, and is not an authoritative interpretation of the Statute which is binding on Courts. Moreover these instructions in the present Manual were first issued in 1922, only four years before the present dispute arose, and they are certainly not in accord with the practice which had been followed for a long time by the Income-tax authorities themselves. The earlier Manual called the Punjab Income-tax Manual, 1909, published under the authority of the Financial Commissioner, Punjab, contains a reference at page 34 to the Financial Commissioner's letter No. 6122, dated 30th September 1890, to the Commissioner, Delhi, which laid down that "portions of the rent of a house actually paid by the owner as property tax to the Municipal Committee are *not* liable" to income-tax. The practice is, therefore, not of such long duration nor so well-settled as would attract the application of the very guarded dictum of Mookerjee J. in *Mathura Mohan Saha vs. Ram Kumar Saha and Chittagong District Board,*[1] in which a particular interpretation of an enactment had been followed without objection for about thirty-five years and had in fact been incorporated in statutory rules made by the Local Government, which had stood unchallenged for a very long time.

After giving the matter my most anxious and careful consideration I find myself unable to accept the view of the law taken by the learned Commissioner of Income-tax. In my judgment, the question should be answered in the negative.

JAI LAL J:—I concur with the judgment of my brother Tek Chand.

AGHA HAIDAR J:—I adhere to my opinion in Civil Reference No. 34 of 1928, and I agree with the amplification of that view by concurring with my brother Tek Chand's judgment in this case.

DALIP SINGH J:—The question of law referred by the Income-tax Commissioner does not, in my opinion, admit of an answer in the affirmative or the negative. Under section 9 of the Income-tax Act the tax payable by an assessee for buildings is the *bona fide* annual value of the buildings. 'Annual value' is defined in section 9 (2) as meaning the sum for which the property might reasonably be expected to let from year to year. The section provides for certain allowances in certain cases and does not include municipal taxes payable by the owner. It seems to me that the sum for which the

(1) I. L. R. 43 Cal. 790 at p. 810.

property might reasonably be expected to let from year to year is a notional amount and has nothing to do with the rent actually received by the owner. A good way of arriving at this notional sum would be the corrected average of the rents paid for similar and similarly situated buildings in any given area. Thus if there were ten buildings similar and similarly situated in the area in question and the rents of eight of them were Rs. 90 *per annum* and the rent of the ninth was Rs. 50 *per annum* and the rent of the tenth was Rs. 120 *per annum*, then the corrected average would be Rs. 90 *per annum*, ignoring the Rs. 50 and Rs. 120 rent, altogether. So in assessing the tax on the buildings paying Rs. 50 and Rs. 120 respectively the notional sum would remain Rs. 90 and the actual rent paid would have no effect whatsoever on this notional value. If, now the Municipality charges house tax on buildings and the question arises whether the notional value includes this tax or not, if the landlord has shifted the burden by agreement or otherwise on to the tenant, the only answer can be that the question does not really arise. The method of arriving at that notional value would still remain as pointed out of estimating at the corrected average of rent paid for similar and similarly situated buildings. If now over a given area the landlord of all similar and similarly situated buildings had shifted the burden of the tax on to the tenants, it would be in my opinion a very fair inference that the reasonable letting value of the buildings in question included the house tax charged by the Municipality. On the other hand, if the majority of the owners had been unable to shift the burden on to the tenants and one landlord had succeeded in so doing, the reasonable letting value would not include the house tax payable to the Municipality. It seems to me that it is always a question of fact having regard to the particular circumstances of each case as to whether it can or cannot be said that the reasonable letting value includes or does not include the house tax charged by the Municipality. It seems to me obvious that the sum for which the property might reasonably be expected to let from year to year does not mean the sum that the most grasping landlord can secure from the most necessitous tenant but is the sum which might reasonably be expected to be paid for that building from year to year regard being had to the rents paid for similar and similarly situated buildings in that locality.

I would, therefore, return this answer to the reference.

NOTE.—I should like to make it clear that the method suggested by me for arriving at the notional rent is only one of many. If circumstances make it impossible or inconvenient to apply this method, other factors may be taken into consideration. One of the more important ones would, in my opinion, be the length of time for which the landlord had been able to shift the burden on to the tenants of the taxation. A long time might well lead to the inference that the notional rent included the amount of the tax.

FINAL JUDGMENT.

TEK CHAND AND AGHA HAIDAR JJ.:—The question referred to by the Commissioner of Income-tax has been answered by the majority of the Full Bench in the negative. Let this be communicated to the Commissioner of Income-tax.

(444) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Justice Sir Alan Broadway, Kt.,
and Mr. Justice Johnstone.

(12th March, 1931.)

The Krishna Ginning and Pressing Factory .. *Assessees.*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Provinces. .. *Referring Officer.*

Indian Income-tax Act (XI of 1922)—Partnership deed—Firm having more than one activity—Partners' share capital and profits varying with business—Separate partnerships, if constituted—Assessment as single firm.

Where three parties to a deed agreed to form a partnership with specified but varying shares in the capital and profits and loss in the business of ginning and pressing of cotton as well as the sale and purchase of cotton as commission agents, the commission agency to be managed and supervised by one of the parties receiving eight annas share of the profits with no liability to contribute towards the capital required therefor, and the accounts were to be rendered annually of the whole concern, the two objects being treated as the activities of one firm,

HELD, that under the deed one firm alone operating along two different lines was constituted, the variance in the nature of the work, or the subscribed capital or profit and loss not creating two separate partnerships for assessment to income-tax.

Case [Civil Reference No. 34 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. F. Provinces for the opinion of the High Court.

CASE.

In a joint petition under Secs. 33 and 66 (2) of the Income-tax Act, I am asked to review the assessment of the petitioner, or in the alternative to refer to the High Court for decision the following points arising out of the assessment of the petitioner firm for the years 1924-25, 1925-26 and 1926-27:—

(1) Whether under the circumstances of the case, the shares of the partners both in capital and in profit and loss and the nature of work being different, the Krishna Factory at Okara and the Commission Agency Firm at Lyallpur constitute two firms or one firm as contemplated by Sec. 239 of the Contract Act; and

(2) Whether the Commission Agency business at Lyallpur having already been separately assessed, the present was a case of escape of income-tax under Sec. 34 of the Income-tax Act.

2. Facts of the case. The facts of the case are that by a deed executed on the 5th August 1920, a partnership was entered into between (a) Mangaldas Girdhar Das Parekh of Ahmedabad, (b) Hormusji Manekji Mehta of Bombay, and (c) Shiv Narain Harkarandas of Lyallpur.

The terms, conditions and purposes of the partnership are contained in the copy of the deed which is attached as Exhibit A *. It will be seen that the parties named above agreed to form a partnership in the Ginning and Pressing factory known as the Krishna Ginning and Pressing Factory at Okara and that the business was to include the ginning and pressing of cotton on wages or otherwise, as well as the sale and purchase of cotton as commission agents. The capital of the partnership was in the first instance to be contributed in the following shares:—(Clause 2 of the deed) (1) Mangaldas Girdhardas of Ahmedabad 6 annas; (2) H. M. Mehta of Bombay 4 annas; (3) Shiv Narain Harkarandas of Lyallpur 6 annas.

If more money was required above what was agreed upon, it had to be supplied by all the parties in the proportion specified above, or by any partner or partners on loan at seven annas nine pies per cent per annum interest. All money required by the third party for the sole cotton agency business of the partnership was to be supplied by the other two parties in addition to what the latter may have contributed under clauses (2) & (4) of the deed (Clause 10).

The shares in profit and loss were to be as follows:—

(1) On all net earnings of the ginning and pressing of cotton in the proportion in which capital was supplied.

(2) On all net commission earned for the purchase of cotton:—(i) Mangaldas Girdhardas, ¼; (ii) H. M. Mehta, ¼; (iii) Shivnarain Harkarandas, ½.

The general management and supervision and control over the employees was to vest in Shiv Narain Harkarandas, and accounts of the partnership had to be rendered annually and the balance sheet and profit and loss account had to be recorded in the books of the partnership and annual profits were to be appropriated (a) towards a reserve fund, and (b) for payment to the partners in the shares specified above.

It should be noted here that there was an entirely separate firm at Lyallpur known as "Shivnarain Harkarandas" in which the partners were:—(1) Shivnarain; (2) Ram Rattan; (3) Kidar Nath; and (4) Sri Ram which owned a share in the partnership under consideration. That firm was separately assessed at Lyallpur on its own income. In the case of the partnership consisting of Messrs. Mangaldas Girdhardas of Ahmadabad, H. M. Mehta of Bombay and Shivnarain Harkarandas of Lyallpur the original assessments for the years 1924-25 and 1925-26 were made only on the income of the Krishna Cotton Ginning and Pressing Factory at Okara. In the course of assessment for 1925-26 the Income-tax Officer discovered that certain cotton commission business was being conducted under the name of Ram Rattan Kidar Nath. After making enquiries he came to the conclusion that this business had not been assessed; he proceeded to assess it under Sec. 34 of the Act with the result that in the absence of any accounts relating to that business he estimated an income of Rs. 13,200 from that source for the year 1924-25 and Rs. 20,800 in 1925-26 and made supplementary assessments accordingly. For the year 1926-27 no proceedings under Sec. 34 were instituted, but an estimated income of Rs. 7,913 from the cotton commission business was included in the assessment of the firm. The petitioner appealed against the inclusion of the income from this source in the assessments, but was unsuccessful, the Assistant Commissioner holding that the entire business belonged

*Not printed.

to the partnership created by the deed executed on 5th August 1930. It is now contended that as the shares of the partners, both in capital and in profit and loss and the nature of the business are entirely different, it is wrong to hold that the Krishna Cotton Ginning and Pressing Factory and the Cotton Commission Agency form one partnership for the purposes of assessment.

3. The first point as formulated by the petitioner is somewhat misleading in so far as it introduces the "Commission Agency firm at Lyallpur" into the question. By this it is presumed that the petitioner refers to the firm of Shivnarain Harkarandas of Lyallpur, which as shown in para 2 above, is an entirely separate entity possessing a share in the Krishna Cotton and Ginning Factory and Cotton Commission business. I would in the circumstances formulate the first question as follows:—"Whether in view of the partnership deed executed by the parties the business of the Krishna Cotton Ginning and Pressing Factory at Okara and the Cotton Commission Agency referred to therein can be said to constitute one partnership or firm or two separate partnerships for the purposes of assessment to income-tax."

4. **Opinion of the Commissioner.** Sec. 239 of the Contract Act defines a partnership as "the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits between them. Persons who have entered into partnership with one another are called collectively a firm". There can be no doubt that the deed creates a partnership between the three persons named therein for the purpose of transacting business connected with the pressing and ginning of cotton and the purchase and sale of cotton on commission. The partnership therefore forms a firm. It is, in my opinion, fallacious to say that there are two separate and distinct firms formed by the partnership deed merely because there are two kinds of businesses to be transacted and the shares of the profits and of the capital subscribed by the parties under each are slightly different. The fact that the capital for the Cotton Commission business was subscribed by two of the parties only does not by itself show that the third party is not a partner in the entire business and the difference in the shares is probably due to the fact that the third party, *viz.*, Shiv Narain Harkarandas of Lyallpur, was to manage and supervise the business without any remuneration besides a share of the profits. Nor does the fact that two lines of business are to be transacted necessarily mean that there are two firms. The terms and conditions of the deed clearly indicate to my mind that there is one firm and not two. *Prima facie* the question whether in view of the terms of the deed there is one firm or two seems to me to be a question of fact and not of law. As however the construction of a document is a question of law, I refer the question as framed by me above to the Hon'ble Judges for decision and in doing so would answer it in the affirmative.

As regards the second point, I consider that it does not involve a question of law. If the Commission Agency business at Lyallpur, by which I understand the petitioner to mean the firm of Messrs. Shiv Narain Harkarandas of Lyallpur, has been assessed in respect of any income from the cotton commission business included in the assessment of the petitioners, it is for the former firm to apply to the Commissioner under Sec. 33 to eliminate such income. As a matter of fact, it has not been shown that any such income has been assessed upon the Lyallpur firm and whether it has or has not been assessed is a question of fact. I therefore do not refer it.

Jagan Nath Bhandari, for the Assessees.

Ranbir Chand Soni, for *Jagan Nath Aggarwal*, for the Crown.

JUDGMENT.

BROADWAY J.—This is a reference under section 66 (2) of the Income-tax Act XI of 1922, made to this Court by the Commissioner of Income-tax, Punjab, etc. It relates to an assessment made on the Krishna Cotton Ginning and Pressing Factory at Okara.

It appears that on the 5th of August, 1920, a partnership was entered into between (a) Mangaldas Girdhardas Parekh of Ahmedabad, (b) Hormusji Manekji Mehta of Bombay and (c) Shiv Narain Harkarandas of Lyallpur. This Shiv Narain Harkarandas of Lyallpur constituted a firm, the members of which were Shiv Narain, Sri Ram and a firm Ram Rattan-Kidar Nath. The firm Shiv Narain Har Karandas carried on the business of commission agents in Lyallpur and under the terms of the agreement in question were given a six annas share in the Ginning and Pressing Factory. One of the objects of this partnership was the purchase of cotton on commission and under the terms of the deed the shares of the parties were varied, the firm Shiv Narain Harkarandas being given an increased share in the profits arising out of the transactions in cotton but at the same time the said firm had to do all the work of the commission agency. This firm—Shiv Narain Harkarandas has been assessed to income-tax on its income.

The Income-tax authorities, in assessing the income-tax on the Krishna Cotton Ginning and Pressing Factory of Okara, discovered that one of the activities of this partnership was dealing in cotton and accordingly an assessment was made on what was estimated as the profits arising out of this particular branch of the partnership business. The Krishna Cotton Ginning and Pressing Factory of Okara then approached the Income-tax authorities and objected to the inclusion in their income of the income earned by the firm of Shiv Narain Harkarandas. It was alleged that under the deed of partnership two separate firms came into existence. The partners of these two firms were the same but the objects of the two firms were different as were also the shares and other financial arrangements. It was, therefore, urged that the income derived from the purchases of cotton was not assessable as a part of the income of the factory.

The Commissioner of Income-tax at the instance of the Factory formulated the following question which has been referred to us:—"Whether in view of the partnership deed executed by the parties the business of the Krishna Cotton Ginning and Pressing Factory at Okara and the Cotton Commission Agency referred to therein can be said to constitute one partnership or firm or two separate partnerships for the purposes of assessment to income-tax". He has expressed his own opinion in the reference and his view is that on a proper construction of this document only *one firm* was created, and that the income from the Cotton Commission Agency had been rightly included as a part of the income of the Krishna Cotton Ginning and Pressing Factory.

It has been urged by Mr. Bhandari for the petitioning Factory that, on a proper construction of the deed of partnership, it should be held that *two* distinct firms came into existence. In support of his contention he emphasized the fact that the firm of Shiv Narain Harkarandas was entitled, so far as the ginning and pressing business was concerned, to a six annas share and was liable to contribute a six annas share of the capital, whereas in dealing with the cotton agency this firm was to supply its skill only and pay nothing towards the capital required and at the same time receive an eight annas share of the profits, the other two partners receiving a four annas share each.

On the other hand, it has been pointed out by Mr. Soni that clauses 7 and 8 of the agreement clearly indicate that the two objects for which this

partnership was formed, were to be treated as the activities of one firm and the accounts were to be rendered annually of the whole concern including the two parts.

It seems to me that on a careful reading of this document the only conclusion to be arrived at is that under it *only one firm came* into existence, this firm having agreed to operate along two different lines, one being the purchase and sale of cotton as agents and the other being the ginning and pressing of cotton in the Ginning and Cotton Pressing Factory at Okara.

My answer to the reference, therefore, is that under this deed of partnership one firm alone was constituted. The petitioner must pay the costs of this Court.

JOHNSTONE J.—I agree.

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(445) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Macnair, Judicial Commissioner and Mr. Staples, Additional Judicial Commissioner.

(17th March, 1931.)

R. B. Seth Bansilal Abirchand .. *Assessees.*

v.

The Commissioner of Income-tax, Central Provinces and Berar .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 10 and 13—Business in share market—Assessee closing accounts and determining profit or loss only on sale of all shares—Reduction of share capital of company—Claim of loss, if allowable—Mortgagee purchasing secured properties—Disallowance of loss claimed, if question of law.

The assessee, a stock jobber, who by his system of accounts determined profit or loss from business in share market only when all shares of a particular company were sold and the transactions in them ceased, claimed a loss of Rs. 7,20,000, being the reduction in share capital of his holding of 1,600 shares of the Kasturchand Mills of the face value of Rs. 500 each, reduced to Rs. 50 per share by resolution of the company. The Income-tax authorities disallowed the claim as not permissible under the assessee's method of accounting and on a reference to the High Court.

HELD, that the giving of shares of small face value in exchange for shares of large face value would not amount to a transaction of sale between the shareholder and the company and consequently the assessee in accordance with his system of accounts was not entitled to claim as a business loss the difference in face value consequent on reduction of share capital.

The Royal Insurance Co. Ltd. *v.* Stephens, 14. Tax Cas. 22; Distinguished.

Where properties mortgaged to the assessee were subsequently purchased by him for a lesser sum and the difference in amount claimed as loss in money-lending business was disallowed by the Income-tax authorities on the ground that the actual value of the properties at the time of sale was not proved.

HELD, that no point of law was involved calling for interference by the Court.

Case[Miscellaneous Judicial Case No. 45 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Central Provinces and Berar, for the opinion of the Court.

CASE.

For assessment during the year 1927-28 the firm of Rai Bahadur Seth Bansilal Abirchand of Nagpur (hereafter called the assessee) who have business in several places in India, made the return under section 22 (2) in which a loss of Rs. 2,82,210 was declared as having been sustained in the previous year ending in Diwali 1926. This return was not accepted as correct and the Income-tax Officer, Nagpur, after looking into the accounts of the assessee, made the assessment on an income of Rs. 5,98,517. An appeal against this order was preferred before the Assistant Commissioner who reduced the total taxable income by Rs. 31,049. An application was then made under section 66 (2) to the Commissioner of Income-tax and some points, said to be of law, were asked to be referred to the High Court. It was also prayed that action under section 33 of the Income-tax Act might also be taken. As on some points the enquiries were not deemed complete, under the powers given to the Commissioner of Income-tax under this section, the order of the Assistant Commissioner was set aside and he was asked to make complete enquiries and then pass his formal order. In compliance with this, the Assistant Commissioner made enquiries and has ordered assessment to be made on an income of Rs. 5,37,142 including the sum of Rs. 2,85,006 derived from incomes, already taxed at source or tax free (vide his order dated the 27th February 1929, copy enclosed, Ex. A*). The assessee has now again made an application under section 66 (2) (copy enclosed Ex. B*). Hence this reference.

3. The assessee's sources of income are:—

Salary as Official Treasurer,
Interest on securities, taxed and free of tax,
Income from house property,
" " money lending,
" " shares of companies,
" " trade in grain, Kiran, Adat, Dalali, etc.

In the computation of the taxable income to be Rs. 5,37,142, certain items have been disallowed. I would here refer to only those items that are relevant for the purpose of this reference:—

Kamptee - Petromax Lamp - Rs. 86-8-6.

It was contended that the Petromax lamp which was purchased for this shop for this amount should have been allowed as an expense. But the Income-tax Officer thought that this expenditure was of a capital nature and therefore did not allow it.

Kamptee - Rakhipuja - Rs. 214-12-6.

This amount was spent during the account year on Rakhipuja and it was incurred in connection with the assessee's business and it was not a personal expense of the assessee prompted by his religious susceptibilities and that the puja was performed for the prosperity of the business. The Assistant Commissioner held: "The Act allows expenses incurred solely for the purpose of earning the profits. It does not take into account the expenses incurred by a trader on account of his religious susceptibilities and beliefs. The assessee incurs this expenditure because he belongs to a particular sect and not because the expenditure is necessary for earning higher profits. Such expenses are of personal nature and not business expenses and could not be allowed."

* Not printed

Bombay - Kasturchand Mill Share Loss - Rs. 7,20,000.

The assessee holds 1,600 shares of the Kasturchand Mills in Bombay of the face value of Rs. 500 each. These shares were purchased in three lots. The first lot of 400 shares was purchased in April 1913, the second lot of 400 shares in 1917 and the third lot of 800 shares in 1921, each lot at Rs. 500 per share. Though the prices of the shares rose in the interim, the assessees showed no income on account of the appreciation in the value of the shares at any time. The assessee's system of accounts has been to determine the profit or loss from business in share market only when all shares of a particular company were sold. No shares of this company are yet sold. But the company, owing to its special financial circumstances, applied to the High Court at Bombay for the reduction of its capital from Rs. 48,00,000 to Rs. 4,80,000 only and this was sanctioned under the High Court's order dated the 19th of August 1926. On this account the assessee asserted that he sustained a loss of Rs. 7,20,000 in the value of these shares. The Assistant Commissioner disallowed the loss by observing: "Merely writing down the value in the books under orders of the High Court on the application of the company for reduction of capital does not reduce necessarily the value in the market, as the market is not at all governed by the orders of the High Court. At the most at this stage it is merely loss of capital. In the market the question is about demand and supply. The assessee has not actually suffered any loss in the market at present and he cannot be allowed to claim a prospective loss. His method of accounting has been that he never ascertains the loss or profits until all the shares are actually disposed of, vide his own case in Miscellaneous Case No. 60|1926*. He might put in the claim when the loss actually occurs to him." In doing so he has fully complied with the ruling in the case mentioned by him, wherein it is observed: "It seems to us inevitable that the actual losses or gains as regards the stock or shares in question over the whole set of transactions connected therewith will be definitely known when the transactions in these have ceased for good and all."

Sambalpur - Loss in timber - Rs. 350.

The assessee had started business in timber in Samvat 1975-76; and timber of all descriptions, i.e., beams, logs, poles, etc., was purchased and sold in lots every year. Stocks were not taken year by year; but accounts were closed by cash balances in books. The whole stock came to be sold by Samvat 1983, and a loss of Rs. 350 was claimed to have been incurred. In none of the previous years was any loss claimed by the assessee on this account. As no stocks were taken, nor was any quantitative account kept and the so-called loss could not be actually verified, it was disallowed as not proved.

Sambalpur-Bad debt of Mohammad Saley Mohammad-Rs. 2,472-4-2.

A decree was obtained against Mohammad Saley Mohammad on 29-7-20. Execution of it was taken only on 17-9-21 and none after that. The amount of Rs. 2,472-4-5 was written off against him in the account year. The Assistant Commissioner held that this case was distinguishable from the case of Sir Shankar Rao Chitnavis which was decided last year by this High Court** and he accordingly disallowed this as a bad debt written off by the assessee.

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* Reported as 3 I. T. C. 57.

** Reported as 3 I. T. C. 321.

Guntur - Bad debt of Pendala Narasimham - Rs. 793-2-9.

P. Narasimham was advanced Rs. 12,000 on a pro-note dated the 14th April 1914. Against him a suit was filed in 1920 and his ginning factory was sold. There was no fresh transaction after 19-10-1919. The Assistant Commissioner thought that this was not the loss of the account year and therefore did not allow it.

Raipur - Bad debt of Framji Dadabhoy - Rs. 52,000.

Mrs. Maneckbai, widow of Framji Dadabhoy Poacha, and her sons, Jehangir and Cowasji, Contractors, etc., of Raipur, had been borrowing money from the assessee for a long time. On the 11th February 1925, on accounts being made, they were found to owe Rs. 99,706-10-0 to the assessee. On this date according to the agreement between the parties, Rs. 16,000 were remitted, Rs. 8,706-10-0 were brought on the Chalu Khata (Current account) and for the remainder, i.e., Rs. 75,000, the debtor's immoveable property including bungalow, shop, house, Kharkhana, etc., situate within the civil lines of Raipur and also the immoveable property, lime kiln, house, etc., situate on the Government land at Mouza Bhatgaon in the Raipur District (called Raipura in the sale deed dated the 11th September 1925) was mortgaged and it was stipulated that Rs. 75,000 would be paid in 15 years at Rs. 5,000 a year with interest at 10 annas per cent per annum due up-to-date. On the 11th September 1925, this debt amounted to Rs. 1,15,749-5-5. Besides these secured debts there were other debts amounting to Rs. 38,644-11-4. Thus the total debt on this date was Rs. 1,54,394-0-9. Towards the satisfaction of this debt, the bungalow, shop, Kharkhana, etc., with land measuring 500′ × 400′ on which these buildings stand and the life insurance policy of Mr. Harmoshji P. Tarapore for Rs. 10,000 were taken by the assessee. The brick and lime kiln at Bhatgaon (Raipura) as it was on Government land for which the lease had expired in the interim, became useless to the seller and the purchaser and its mention was omitted from the sale deed. In the sale deed, the price of the buildings, etc., is put down at Rs. 23,000; and it is contended that Mr. Syed Ali Shah, Divisional Fund Engineer of Raipur, estimated their price at Rs. 22,700 only and hence Rs. 23,000 (round figure) was put down as the sale price of these buildings. It was thus contended that of the total debt of Rs. 1,54,394 only Rs. 33,000 (Rs. 23,000 plus Rs. 10,000) came to be realised and the remainder became a bad debt and as it was written off against the debtors by the assessee, it should have been allowed. The Income-tax Officer as also the Assistant Commissioner took the price of the buildings to be Rs. 75,000 for which it was originally mortgaged and disallowed the difference, i.e., Rs. 75,000 minus Rs. 23,000, or Rs. 52,000. The certificate granted by Mr. Syed Ali Shah stating that the value of the property in the Civil Station of Raipur together with the land under it was Rs. 22,700, is lost. Mr. Syed Ali Shah was called upon to say how he valued this property. He said that unless he was shown the original certificate granted by him, he could not say what he wrote and under what circumstances. In the meantime the assessee expressed a wish before the Income-tax Officer, Nagpur, who made the assessment in this case, that he did not then desire to have Mr. Shah examined as a witness and the matter stopped there. In the sale deed it is said: "And it has been further agreed between the parties to this sale, i.e., the vendors and the vendees, that the vendors described above shall have a right to re-purchase the aforesaid provided they pay back the consideration of this sale, viz., Rs. 23,000 to the vendees within a period of 8 years from the date of this sale and in case the vendors pay

this amount of Rs. 23,000 to the vendees at any time within the period of 8 years from the date of the sale the vendees shall be bound to accept the same and immediately reconvey the premises mentiond aforesaid to the vendors and put them immediately in possession thereof." On the strength of this stipulation and the certificate of the Divisional Fund Engineer which is lost, it is alleged that the value of the property is only Rs. 23,000 and not more. The Assistant Commissioner in disallowing the so-called bad debt observed: "How this value was arrived at by the Local Fund Engineer is not clear from the record. It is inconceivable that a property mortgaged for Rs. 75,000 should have been of the value of only Rs. 23,000. The plot is a big one, situated in the Civil Station and at a very convenient place and I am not prepared to accept the valuation contained in this sale deed at the instance of the Local Fund Engineer who when asked to show how he valued the property, could not give the working. It is unfortunate that this certificate should have been lost. But it is not so much the certificate that is needed as the working out of the valuation. I am not prepared to allow this item."

Lahore - Bad debt of Gangabisan - Rs. 14,938.

Gangabisan Kayasth of Lahore, a nephew of Bansilal whose property he had got, owed the assessee Rs. 28,553-13-0 on 2nd July 1924. For this amount and for Rs. 6,446-3-0 which he received before the Sub-Registrar, i.e., for Rs. 35,000 in all, he executed a mortgage deed in favour of the assessee mortgaging

(1) Building of ice factory, aerated water, flour mills,
(2) Theatre buildings,
(3) Weaving shed and spare land,
(4) Ice factory machinery including compound condensing engine, boiler, etc.,
(5) Soda water machines,
(6) Rice and Flour Mills,
(7) Portable engine and weaving machinery,
(8) Cinema Electric Installation machinery, motor, and
(9) Two lorries (vide copy of sale deed enclosed, Ex. C.).

Under the sale deed dated the 21st January 1926, he finally sold these things after taking Rs. 500 more. A certificate dated the 27th October 1926 was obtained from one Meghraj, according to which the value of the Quarters, Palace Theatre, Flour Mills, Ice Factory, and "Rest portion, grass lawn, tank, etc., etc.," is estimated at Rs. 20,062 and hence a claim for the loss of Rs. 14,938 was put forward. It was disallowed on the ground that the value of the purchased property was under-estimated. The certificate of Mr. Meghraj is on the file. It speaks for itself. The price of the buildings seems calculated on the plinth area varying from Re. 1 to Rs. 1-8 per square foot. This is simply absurd. The certificate does not give the kind of the buildings it is dealing with. Besides the few buildings mentioned in it, there is no mention of the cinema electric installation machinery, the two lorries, etc., etc., and the machinery in the Flour Mills and Ice Factory is without details, estimated at round figures of Rs. 1,000 and Rs. 4,000, respectively. On the face of it the certificate is most unreliable. The department had no chance of cross-examining the gentleman. It is not difficult to obtain such certificates. It was held that the certificate was of no evidential value and the loss was disallowed as not proved.

Bellarpur Collieries - Depreciation allowance - Rs, 1,09,730-12-0.

The assessee and Sir Maneckji Dadabhoy of Nagpur are equal partners in the Bellarpur Collieries of the Chanda District. These Collieries sustained a loss of Rs. 5,11,783 in the account year. The depreciation on machinery, buildings, plant, etc., came to be Rs. 2,19,461. Thus in the partnership case it was contended that the total loss on the Collieries was Rs. 7,31,244. It was in that case held that as there was no income in the Collieries, the depreciation amount would be carried forward for future years, vide section 10 (2) (vi) (b) of the Income-tax Act. The partnership concern claimed that it should be added to the loss of the year so that the different partners could claim a set off of the total loss in their individual cases. As that point was not acceded to in the partnership case and the loss of the partnership was found to be only Rs. 5,11,783, half of the depreciation amount coming to the assessee's share amounting to Rs. 1,09,730 was disallowed in this case by the Income-tax Officer. In the partnership case, Sir Maneckji Dadabhoy has made an application under section 66 (2) of the Income-tax Act and his case was submitted to this Honourable High Court on the 11th of May 1929 vide this office letter No. R. H. C. 28|28-29, dated the 11th May 1929.*

3. In the application for reference to the High Court the assessee has asked the following points to be referred to the High Court:—

Kamptee - Gas lights - Rs. 86-8-6.

(1) Whether the Assistant Commissioner was right in holding that the petromax lamp purchased for replacing a kerosine oil lamp in the Head Office at Kamptee was an additional equipment to the furniture of the office and as such was of capital nature.

Kamptee - Rakhipuja.-.Rs. 214-12-6.

(2) Whether, in the absence of any evidence to the contrary the Assistant Commissioner was right in holding that the Rakhipuja expenses incurred in the Head Office were in the nature of personal expenses of the assessee.

(3) Whether the Assistant Commissioner was right in holding that the sole test for allowing business expenses was to find out if the expenses were incurred for earning profits and not, if the same were incurred in pursuance of well-established mercantile usage and custom in the business community to which the assessee belongs.

Bombay - Kasturchand Mills Share loss - Rs. 7,20,000.

(4) Whether the assessee was not entitled to claim a deduction in respect of the sum of Rs. 7,20,000 as a loss sustained by him in the account year, in respect of the 1,600 shares of the Kasturchand Mills Co., Ltd.

(5) Whether the Assistant Commissioner was justified in holding in the absence of any evidence to the contrary that "it is merely loss of capital."

* Since reported as 4 I. T. C. 255.

Sambalpur - Loss in timber - Rs. 350.

(6) Whether the Assistant Commissioner was right in disallowing loss in the purchase and sale of timber, simply because no quantitative account was kept.

Sambalpur - Bad debt of Mohammad Saley Mohammad	*Rs. 2,472-4-5*
Guntur - Bad debt of Pendala Narasimham	*Rs. 793-2-9*
Total	*Rs. 3,265-7-2*

(7) Whether on the admitted facts of the cases the assessee was not entitled in the computation of the assessable profits of his money lending business, to claim a deduction in respect of the bad debts definitely written off as irrecoverable in the account year.

(8) Whether the Income-tax authority can deprive the assessee of his inherent right of declaring debts bad as and when he finds, after sufficient enquiry and waiting, that from the circumstances of the debtor he is unable to recover them.

Raipur - Bad debt of Framji Dadabhoy -	*Rs. 52,000*
Lahore - Bad debt of Gangabisan -	*Rs. 14,938*
.. *Total*	*Rs. 66,938*

(9) Whether in respect of the claim of the assessee of Rs. 52,000 being the bad debt of Framji Dadabhoy Poacha of Raipur and Rs. 14,938 being the bad debt of Gangabisan of Lahore, the arbitrary rejection by the Income-tax Officer and Assistant Commissioner of the valuation of mortgaged properties by independent public officers was valid in law and whether in the absence of any evidence discrediting the said valuation, the same ought not to have been accepted by the Income-tax authority.

(10) Whether there are any legal grounds in support of the summary rejection by the Income-tax authority of the valuation arrived at by expert officers and accepted both by the creditor and debtor and whether the said rejection by the Assistant Commissioner was not perverse.

Balarpur Collieries - Depreciation allowance - Rs. 1,09,730-12-0.

(11) (a) Whether the depreciation allowance under section 10 (2) (vi) of the Income-tax Act is claimable by an assessee only if the use or working of the machinery, plant, etc., depreciating brings profits or gains to the assessee and does not result in loss in the year for which the allowance is claimed?

(b) Whether the proviso (b) to section 10 (2) (vi) is a bar to the claim of depreciation allowance where the assessee owning machinery, plant, etc., has income, profits or gains chargeable under the Act and assessed to income-tax for the year in respect of which the depreciation allowance is claimed?

(c) Whether on the facts of this case the disallowance of the depreciation allowance by the Income-tax authorities was legal or authorised under any of the provisions of the Act?

4. My opinion on each of them is:—

(1) As the item involved is a very petty one, I have allowed it in revision. This point is, therefore, not referred to the Honourable the High Court.

(2) Such an expense is not mentioned in sub-section (2) of section 10 which gives a complete list of expenses allowed in business, and I am of opinion that this should be answered in the affirmative.

(3) In my opinion this point too be answered in the affirmative.

(4) In view of the system of accounts maintained by the assessee and in view of the ruling of this Honourable Court referred to above, I submit that this point be answered in the negative.

(5) This question seems to have been unnecessarily framed. The Assistant Commissioner has stated: "He (the assessee) might put in a claim when the loss actually occurs to him." The question of the nature of the loss being capital or otherwise would therefore be considered then.

(6) Inasmuch as the loss claimed was not proved, the Assistant Commissioner was right in disallowing it and in my opinion this question be answered in the affirmative.

(7) & (8) Pending the decision of the application made to this Honourable Court for appeal to the Privy Council on the points of bad debts as decided in the Sir Shanker Rao Chitnavis's cases,* I have, in revision, allowed these two bad debts tentatively and reference on these two points is therefore not made.

(9) & (10) It has already been held by this Honourable High Court that the burden of proof of the loss claimed by the assessee lies on him. *Radhakisan Ramnarayan* v. *Commissioner of Income-tax, C. P. & Berar.*[1] The assessee has failed to prove both these losses. He was given an opportunity to examine Mr. Syed Ali Shah but he did not avail himself of it and the certificate granted by Megharaj of Lahore has been shown to be of no evidential value. There was no summary rejection of the certificates granted by the so-called expert officers; but these certificates were not proved before the Income-tax Officer and could not be relied upon for reasons given by them. I therefore submit that both these points be answered in favour of the Department.

(11) The same points have already been referred to the Honourable High Court in the other case and the decision in that case will be applicable here also.

P. R. Shrinivasan, A. V. Khare and *A. D. Mande*, for the Assessees.

D. N. Choudhari, for the Crown.

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* Reported as 3 I. T. C. 321.

(1) 3 I. T. C. 366.

JUDGMENT.

The assessee, the firm Rai Bahadur Seth Bansilal Abirchand, Nagpur, asked for a reference to the High Court with regard to a number of points but his Counsel confined his arguments to points connected with three items. He first urges that a deduction should have been allowed in respect of the sum of Rs. 7,20,000 which he claims was lost by him owing to the reduction of the capital of the Kasturchand Mill. He admits that, according to the system of accounts followed by the assessee, a loss from business in the share market should be allowed only when shares of the company were sold. He urges, however, that the company must be considered to have purchased its shares making payment by giving other shares of smaller value. In our opinion, the reduction of capital does not involve the purchase of the shares by the company. Section 55 (1) of the Indian Companies Act, 1913, is as follows:—"No company limited by shares shall have power to buy its own shares unless the consequent reduction of capital is effected and sanctioned in manner hereinafter provided." The reduction of capital then may be effected by the company buying its shares, but it may be effected in other ways. Section 55 (2) states that a company, subject to certain conditions may reduce its share capital in any way. The Kasturchand Mill reduced its capital by giving shares of small face value to all shareholders. It is at least difficult to think of a transaction between a company and all its shareholders as a sale. We are referred to the judgment of Rowlatt J., in *The Royal Insurance Company, Limited,* v. *Stephen,*[1] but in that case the assessees got, in exchange for certain shares, stocks and securities of an entirely new body giving the assessees an interest in a definite undertaking. We hold, therefore, that there was nothing in the nature of a sale of the Kasturchand Mill shares. The applicant then, in accordance with the system of accounts, is not entitled to claim a loss from business in the share market.

2. The next item refers to an alleged loss of Rs. 52,000. In 1925 certain property was mortgaged to the assessee for Rs. 75,000; the assessee, some months later, purchased this property for Rs. 23,000. It is urged that the whole debt due by the mortgager except Rs. 23,000 has been lost by the assessee. It was held by the Commissioner of Income-tax, that the value of the property was Rs. 75,000. This is a finding of fact; it is based on evidence, namely, the fact that the assessee took a mortgage for Rs. 75,000, of the property. Even if the amount represented a bad debt, an inference can be drawn that the assessee, a business firm, would not pay stamp duty on Rs. 75,000, if a mortgage for Rs. 23,000 would have effected his purpose. A right of re-purchase for Rs. 23,000 given in the sale-deed has received consideration. It is enough to say that there may be reasons for this condition other than the actual value for the property. The assessee could easily have procured cogent evidence regarding the value of the property and did not do so. No point of law then is involved in the decision of fact.

3. The next point refers to an alleged loss of Rs. 14,938. Here again property was mortgaged for Rs. 35,000, in 1924 and was sold in 1926, the owner being given Rs. 500 in cash. It was held that the assessee had failed to prove that the property was worth only Rs. 20,000, and there is no reason for interference with this finding.

1. 14 Tax Cas. 22.

4. The answers of this Court to the questions which were argued before us are, therefore, as follows: The assessee is not entitled to claim a deduction in respect of the loss sustained by him in connection with 1,600 shares of the Kasturchand Mills, Ltd. No question of law arises with regard to the claims for Rs. 52,000 and Rs. 14,938; the decision of the Income-tax Officer on the question of the value of the mortgaged property was based on proper evidence. Costs of this application must be borne by the assessee. Counsel's fee Rs. 200.

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(446) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Macnair, Judicial Commissioner, and Mr. Staples, Additional Judicial Commissioner.

(17th March, 1931.)

R. B. Seth Bansilal Abirchand . *Assessee*

v.

The Commissioner of Income-tax, Central Provinces and Berar. .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Sec. 4 (2)—Assessee carrying on banking business in and outside British India—Remittances of monies to and fro—Assessability of excess remittances—Presumption as foreign profits.

The assessee carrying on banking business involving the sending of money from one place of business to another, remitted in the account year more money from his place of business outside British India than he had sent to that place. On an assessment of this excess remittance under Sec. 4 (2) of the Income-tax Act it was contended that no sums were received in British India as foreign profits, the remittances being merely current dealings in money in the usual course of banking business. On a reference to the Court,

HELD, that it was a proper presumption that the assessee, a resident in British India intended his foreign profits to reach him in British India and it must be assumed that the sum assessed which was less than the foreign profits made in that year represented those profits.

Case [Miscellaneous Judicial Case No. 53 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1932) by the Commissioner of Income-tax, Central Provinces and Berar, for the opinion of the Court.

CASE.

Before the assessment year 1929-30 Rai Bahadur Seth Bansilal Abirchand, Bankers of Nagpur, used to be assessed to income-tax as a Hindu Undivided Family. In 1929-30 they applied to be registered as a firm and the application for registration was allowed by the Income-tax Officer, Nagpur, and the hitherto joint Hindu family was assessed as a registered firm for the first time in the year 1929-30. The sources of income of the firm are

(i) Salary as Treasurer,
(ii) Interest on Securities (taxed),
(iii) " " (free of income-tax),

(iv) Property,
(v) Money lending,
(vi) Speculation in shares and securities,
(vii) Trade in grain, Kirana, Adat and Dalali
(viii) Dividends.

The head office of the firm is at Kamptee and it has branches at several places in and outside British India. For the year 1929-30 the assessee returned a total income of Rs. 6,61,710-14-2, but the Income-tax Officer, Nagpur, found the income to amount to Rs. 10,39,262. The net income after deduction of interest on securities and dividends already taxed was found to be Rs. 3,50,027 and was accordingly taxed to Rs. 26,102-7-0.

2. Against the above assessment the assessee preferred an appeal to the Assistant Commissioner of Income-tax, Nagpur, contending that the sum of Rs. 1,25,869 which represented the net amount remitted to his Bombay and Calcutta branches by his foreign branches at Hyderabad, Secunderabad and Nizamabad, as shown below, was wrongly taken as his foreign profits and assessed to income-tax:—

BOMBAY FIRM (NET RECEIPTS).

(i) From Secunderabad:—			
Total receipts	Rs.	4,89,418	
Less old balance	,,	4,71,551	17,867
(ii) From Hyderabad (Deccan):—			
Total receipts	Rs.	53,00,175	
Less old balance	,,	52,30,090	
	,,	70,085	
Add interest debited	,,	925	71,010
(iii) From Nizamabad (Deccan):—			
Credits	Rs.	4,30,210	
Debits	,,	4,16,227	
	,,	13,983	
Old debit balance	,,	15,414	
Interest debited but excluded	,,	2,101	31,498
Total Bombay firm ..			1,20,375

CALCUTTA FIRM (NET RECEIPTS).

(i) From Secunderabad (Deccan)			
Credits	Rs.	44,357	
Debits	,,	41,078	3,279
(ii) From Hyderabad (Deccan):—			
Credits	,,	39,171	
Debits	,,	37,365	1,806

(iii) From Nizamabad (Deccan):—			
Credits	"	726	
Debits	"	317	409
		Total Calcutta firm ..	5,494
		Grand total net receipts ..	1,25,869

BOMBAY FIRM (NET PAYMENTS).

(i) To Bikaner	Rs.	7,25,340	
(ii) To Selu (Deccan)	"	37,987	
(iii) To Jaipur	"	73,736	8,37,063
		Grand total net payments ..	8,37,063

A copy of the assessee's memorandum of appeal dated the 28th April 1930 and of the Assistant Commissioner's order dated the 24th June 1930, passed in appeal are attached for ready reference. The Assistant Commissioner, for reasons stated in the appellate order, rejected the assessee's appeal.

3. On the 16th August 1930, the assessee presented an application of that date requesting my learned predecessor either to allow a deduction of the sum of Rs. 1,25,869 or to refer to the High Court the following six questions of law:—

(a) Whether, having regard to the admitted facts of the case, the assessment of the sum of Rs. 1,25,869 is legal and valid under section 4 (2) of the Income-tax Act.

(b) Whether there is any presumption in law on the admitted facts of the case that the remittances between branches of the Banking business must be presumed to be from out of the profits.

(c) Whether the presumption as to foreign remittances being from out of the profits is applicable to a case of inter-branch transactions of a Banking concern in respect of current dealings in money in the usual course of business.

(d) Whether the finding of the Income-tax authorities that the remittances were from out of profits is illegal and perverse as vitiated by refusal to consider the evidence before the Income-tax authorities, namely, the accounts of the British Indian branches and whether there was any legal evidence to support the finding of the Income-tax authorities.

(e) Whether the assessment in the case is legal or justifiable on the sole ground of non-production of the foreign branches accounts or profit and loss statements, in view of the other evidence produced by the assessee.

(f) Whether, assuming that there was an initial presumption that the remittances were from out of profits, that presumption has not been displaced in the present case by the British Indian accounts and other evidence produced by the assessee about whose veracity or genuineness there has not been any shadow of doubt.

As in my opinion the order of the Income-tax Officer bringing under assessment the sum of Rs. 1,25,869 and also the order of the Assistant Commissioner refusing deduction of that amount from the assessable income of the assessee were quite legal and proper, I have decided to make the desired reference to the High Court instead of allowing the deduction claimed in re-

vision. Of the six questions submitted by the assessee, the first is the only one that could be referred for the decision of the High Court. All the other questions are either reiteration of the first question in one form or another, or are mere arguments which might be addressed to the High Court, but which, in my opinion, cannot be referred to it as questions of law. Again, in face of the admissions made by the assessee some of these questions would not seem to arise at all. Questions (b), (d) and (f) for instance, do not arise after the assessee admitted in para 9 of his appeal petition dated the 28th April 1930 that there were profits at the three foreign branches sufficient to cover the remittances in question and further when he admitted in para 10 of his application dated the 23rd September 1930 for reference that the remittances came from profits of the foreign branches. Question (c) is apparently a reiteration of question (a). As regards question (e) it is sufficient to state that the first question, i.e., question (a) embraces it and that it would rather be a ground of appeal than a question of law to be referred to the High Court. I am therefore referring only question (a) for the orders of the High Court.

4. Section 4 (2) of the Income-tax Act, XI of 1922, under which the sum of Rs. 1,25,869 has been taxed, runs as under:—

> "Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be the profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose."

The above words to my mind, lay down in sufficiently clear terms that the foreign profits of an assessee become assessable only when they are received in or brought into British India within three years of their having accrued or arisen out of British India. Further, it is also clear that the Income-tax Department has nothing to do with the profits or losses of an assessee made or sustained out of British India unless and until the *profits* are actually received in or brought into British India within the prescribed period of time when the Department becomes entitled to tax them under this section. It is not only admitted by the assessee that there were profits at the three foreign branches sufficient to cover the remittance of Rs. 1,25,869, but also that the remittance came out of profits of the foreign branches. It is, however, contended that as these remittances were on current account the excess of credits over debits (Rs. 1,25,869) could not be regarded as profits. In *C. W. Schulze* v. *S. W. Benstead*[2] and *Scottish Provident Institution* v. *Allan*[3] as also in the case of *Murugappa Chetty* v. *The Commissioner of Income-tax, Madras*,[4] and *K. P. Mohammad Kasam Routher* v. *The Commissioner of Income-tax, Madras*,[5] it has been distinctly held that in respect of remittances from abroad, it is for the assessee to prove that the remittance was capital and not income and in the event of his failure to discharge this onus, the presumption would apparently be that so long as the capital in the foreign branch is not depleted all remittances are of profits.

The assessee declined to produce the account books of his foreign branches to prove that the remittances were out of capital and not profits. He did not avail himself of the distinct opportunity which the Income-tax

(2) 8 Tax. Cas. 259.
(3) 4 Tax. Cas. 591.
(4) 2 I. T. C. 139
(5) 4 I. T. C. 427.

Officer, Nagpur, gave him of proving that the remittances came out of capital, and considering the possibility of the assessee's agent not being able to appreciate the suggestion made by the Income-tax Officer, the Assistant Commissioner allowed the assessee another opportunity of adducing the same evidence in appeal but the Agent definitely declined to avail himself of this opportunity either. It is clear therefore that the assessee failed to discharge the burden of proof which the rulings quoted above definitely imposed on him. On the other hand, the admissions made by the assessee in para 9 of his memorandum of appeal and in para 10 of his application for reference to which reference had already been made in the preceding paragraphs, would go to show that the assessee has absolutely no case at all; for once it is admitted that the remittance came from profits (vide para 10 of his application for reference to the High Court), the assessee's case must fall to the ground. Since in practice the profits received are brought on the current account in the first instance and there would be nothing to prevent an assessee from bringing his profits on the current account with a view to making the necessary adjustments in later years, the entry in the assessee's British Indian account books could never be regarded as conclusive evidence of the fact whether or not the capital account of the foreign branches was depleted to the extent of the remittances made to British India. The assessee's foreign accounts alone could reveal the real nature of the remittances made. Nor could the fact of the assessee having charged interest to his foreign branches or of his having paid interest to them be taken to rebut the presumption of profits having been received in the shape of the remittances in question. It may be noted here that in the assessment proceedings the interest so charged or paid has not been taken into account at all in determining the income of the assessee. The facts of this case are on all fours with the facts of the case of *Jasrup Baijnath* v. *Commissioner of Income-tax, C. P. and Berar*,[6] in which the questions referred were answered in favour of the Department. The assessee seems to rely on the Full Bench decision of the Madras High Court in *S. A. Subbiah Iyer* v. *The Commissioner of Income-tax, Madras*,[7] but the facts of that case are entirely different from the facts of the applicant's case. In that case it was admitted by the Commissioner that the remittances from the current account in Quilon were shown in the account to be remittances from capital and were similarly shown in the Tinnevelly books to be received in the shape of capital. In the assessee's case, however, this is the very question at issue and as the facts stand he not only persistently declined to discharge his burden of proof by producing the foreign shop accounts but even made the unqualified admission that the remittances in question came from profits. In the above Full Bench judgment of the Madras High Court on which the assessee relies, the learned Judges held that the use to which an assessee chooses to put his money on receipt of it cannot alter the character in which it was received. The remittances in question coming out of the profits of the assessee's foreign shops, their mere entry in the current account of his British Indian branch could certainly not invest them with the character of capital, nor, as the assessee seems to think, would the receipt of the moneys at the assessee's British Indian branches instead of his Headquarters shop be tantamount to anything other than receipt in British India. I would therefore suggest that the question referred to the Honourable Court be answered in the affirmative.

P. R. Shrinivasan, A. V. Khare and *A. D. Mande* for the Assessees.

D. N. Choudhari for the Crown.

(6) 5 I. T. C. 90.

(7) 4 I. T. C. 345.

JUDGMENT.

The question referred to this Court by the Commissioner of Income-tax is stated as follows:—"Whether, having regard to the admitted facts of the case, the assessment of the sum of Rs. 1,25,869 is legal and valid under section 4 (2) of the Income-tax Act." The assessee had business outside British India. It is admitted that this business resulted in profit. The business included banking business and involved the sending of sums of money from one place of business to another. The result of these remittances was that, at the end of the year, the assessee, at his place of business in British India, had sent more money from his place of business outside British India than he had sent to that place.

2. It is contended that as no sums were received in British India as profits of the business outside British India, no profits from that business were received in British India. We are unable to accept this contention. It is a proper presumption that an assessee who resides in British India intends that profits from foreign branches shall eventually reach him in British India; by a series of transactions a sum less than profits made in that year has reached him; it must be assumed that this sum represents profits. It is impossible to hold that profits were not received in British India when the assessee has made profits outside British India and money has actually been sent to the country where the assessee resides. The profits do not, at the end of the year, form part of the balance in the assessee's hand at the place of business outside British India; a part of the profits swells the balances at the places of business within British India. It is not material that the course of business results in money coming to British India without any necessity for remittance of profits as such. The assessment was, therefore, legal and valid; costs of this reference will be borne by the assessee. Counsel's fee Rs. 100.

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(447) IN THE HIGH COURT OF JUDICATURE AT RANGOON.
FULL BENCH

Before Sir Arthur Page, Kt. Chief Justice, Mr. Justice Das, Mr. Justice Maung Ba, Mr. Justice Mya Bu and Mr. Justice Dunkley.

(25th March, 1931.)

Abdul Baree Chowdhury .. *Assessee.*

v.

The Commissioner of Income-tax, Burma .. *Referring Officer.*

Indian Income-tax Act (XI of 1922). Secs. 23 (4), 27, 30 (1) and 66 (3) —Assessment under Sec. 23 (4)—Refusal to reopen and appeal therefrom—Arbitrariness of assessment, if question of law for reference to High Court—Discretion of Income-tax Officer.

That an assessment under Sec. 23 (4) of the Income-tax Act was entirely arbitrary, that is, did not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion, does not involve a question of law arising out of the Assistant Commissioner's order in an appeal under Sec. 30 (1) against the order of the Income-tax Officer under Sec. 27 refusing to make a fresh assessment; nor can it be regarded as a ground entitling the High Court to pass an order under Sec. 66 (3) requiring the Commissioner of Income-tax to state a case.

An Income-tax Officer has no discretion when making an assessment under Sec. 23 (4) and the question whether or not the default of the assessee is such as to bring into play the provisions of that section is one of fact and not of law.

A. R. A. N. Chettyar Firm v. *The Commissioner of Income-tax, Burma.* 2 I. T. C. 477;
S. P. K. A. A. M. Chettyar Firm v. *The Commissioner of Income-tax, Burma.* 4 I. T. C. 182;
P. K. N. P. R. Chettyar Firm v. *The Commissioner of Income-tax, Burma.* 4 I. T. C. 87;
P. K. N. P. R. Chettyar Firm v. *The Commissioner of Income-tax, Burma.* 4 I. T. C. 340. .. Overruled.

Reference [Civil Reference No. 25 of 1930] made by Mr. Justice Heald and Mr. Justice Mya Bu to a Full Bench under Rule 30 of the Appellate Side Rules (Civil) in an application to the High Court under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Burma, to state a case for the opinion of the High Court.

Leach, for the Assessee.

A. Eggar, for the Crown.

JUDGMENT.

PAGE, C.J.:—In this case, on an application being made to the High Court by an assessee for an order requiring the Commissioner of Income-tax, Burma, to state a case under section 66 (3) of the Indian Income-tax Act (XI of 1922), Heald and Mya Bu, JJ., referred the following questions to the Full Bench for determination: "Whether the fact that an assessment under section 23 (4) of the Income-tax Act was entirely arbitrary involves a question of law which arises out of the Assistant Commissioner's order passed in an appeal under the provisions of section 30 (1) relating to appeals against the refusal of the Income-tax Officer to make a fresh assessment under section 27, or which the High Court is entitled to regard as ground for an order under section 66 (3)." In order to appreciate the problem that we are invited to solve it is necessary to consider the provisions pursuant to which estimated assessments are required to be made under the Income-tax Act.

The material sections are:—Sec. 23 (4). If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax officer shall make the assessment to the best of his judgment and, in the case of a registered firm, may cancel its registration.

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.

Sec. 27. Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of

section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

Sec. 30 (1). Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 25-A or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order.

Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27.

Sec. 31 (3). In disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment,

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment,
or, in the case of an order refusing to make a fresh assessment under section 27,

(c) confirm such order, or cancel it and direct the Income-tax Officer to make a fresh assessment or, in the case of an order under sub-section (2) of section 25 or section 28,

(d) confirm, cancel or vary such order:

Provided that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such enhancement.

Sec. 33 (1). The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-section (4) of section 5.

(2). On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit,

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

Now, the questions that arise in the course of assessments to income-tax are mainly,—indeed, almost wholly—questions of fact; and the policy of the Legislature, both in India and England, has been that questions of fact concerning the profits and gains that a person has derived from his property or his business can more readily and effectively be determined by laymen conversant with the circumstances in which the assessee "lives and

moves and has his being" than in proceedings in a court of law. In England the persons entrusted with the duty of making assessments to income-tax, generally speaking, are non-official laymen appointed as Commissioners in that behalf for divisions and areas in respect of which they have special knowledge of the local conditions (8 and 9 Geo. V. c. 40 ss. 58, 61, 65, 67 to 70). The decision of the Commissioners on questions of fact is conclusive if there is any evidence upon which it could be based, but in respect of every assessment an appeal lies to the High Court by way of case stated if it is alleged that the determination of the Commissioners is "erroneous in point of law" (S. 149, *Farmer* v. *Cotton's Trustees*[1]), even in cases in which by reason of default on the part of the assessee an estimated assessment has been made (ss. 112, 121, 122, 136—*Macpherson* v. *Moore*[2]). In India, as in England, the persons upon whom is cast the duty of making assessments to income-tax are laymen, but, whereas in England such persons normally are non-officials, in India the Income-tax authorities are, or consist of, Government officials (S. 5), and the only remedy open to an assessee who is aggrieved by an assessment made upon him is to seek redress, by way of appeal or review as the case may be, from one official of the Income-tax Department of Government to another. It cannot be doubted, I apprehend, that the English system, if feasible, is far more satisfactory, and would be regarded by the general public as a more equitable method of assessment than that obtaining in this country. But whether it would be practicable or expedient in India or in Burma to substitute for officials a body of non-official laymen as the taxing authority is a matter of policy with which the Courts are not concerned, and in respect of which I am not in a position to express an opinion, although the creation of a Board of Referees in 1930 (see Sec. 33-A of the Act of 1922) is not without significance in this connection. There can be no doubt, however, that the fact that the Income-tax Department in India and Burma is "a judge in its own cause" has at times and among certain sections of the general public caused uneasiness and anxiety is felt lest the possession of such autocratic powers by officials of a Government Department may sometimes result in injustice or hardship being done to those upon whom assessments are made. I do not suggest that hard or unconscionable assessments have in fact been made, or that there is any reason to suppose that the Income-tax authorities in Burma do not perform their duty with fairness and to the best of their ability, but the existence of the disquiet in the mind of the public to which I have referred has led to one result that is material for the purpose in hand, namely, that the High Court, at least so it appears to me, if I may say so with all respect, has endeavoured to secure the power of controlling the action of Income-tax officials in making assessments by placing a construction on the provisions of the Income-tax Act for which no warrant can be found in the language in which its terms are couched.

It is the function of a Court, however, merely to administer the law as it is, and not to attempt by judicial decisions to amend what the Court may rightly or wrongly deem to be faulty legislation.

Now, I am not satisfied as to the meaning that the learned Judges intended the word "arbitrary" to bear in the question propounded. If the word is taken to mean that the Income-tax Officer, regardless of information in his possession, deliberately, recklessly or fraudulently has made an assessment under section 23 (4) which he knows that he was not justified in making, in such circumstances and assuming that the assessee has

(1) 6 Tax Cas. 590; (1915) A.C. 922. (2) 6 Tax Cas. 107.

failed to obtain redress as provided in the Act, I should not be prepared to hold, as at present advised, apart altogether from the provisions of the Income-tax Act, that this Court does not possess jurisdiction in virtue of its inherent prerogative powers to order the Income-tax Officer to do his duty. In *Dyson* v. *Attorney General*[3] Farwell, L.J., observed that "the Courts are the only defence of the liberty of the subject against departmental aggression," and, as the same learned Lord Justice pointed out in *Rex* v. *Board of Education*,[4] "The point is of very great importance in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court, within the limits now well established by law." . . . "Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals." But I do not apprehend that the learned Judges intended the word "arbitrary" to bear this meaning in the question set out in the order of reference. It appears to me that their Lordships when using the word "arbitrary" in this connection intended the word to mean that the assessment "did not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion," see per Heald, J. in *S. P. K. A. A. M. Chettyar Firm* v. *The Commissioner of Income-tax*.[5] If that is the meaning to be attributed to the word "arbitrary" in the order of reference I am clearly of opinion that the answer to the questions propounded should be in the negative. *Ex hypothesi* an assessment under section 23 (4) must be made upon inadequate materials. It is a mere estimate, and if it is made by the Income-tax Officer *bona fide* and "to the best of his judgment" (which only means as best he can in the circumstances) the assessee who has "not chosen to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made" upon him by the Crown, (see per the Lord President in *Macpherson* v. *Moore*.[6]) The assessment necessarily must be in this sense, at any rate to some extent, an arbitrary one. In *S. P. K. A. A. M. Chettyar Firm* v. *Commissioner of Income-tax*,[5] it was further held that the assessment "must also be reasonable, and the materials or reasons on which it is founded must be so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable." Why, if the assessment under section 23 (4) is a mere estimate made without materials upon which an accurate assessment can be based? Suppose the assessee has refused to furnish any statement, or to produce any materials upon which an assessment can be made, is he for that reason to escape assessment altogether? Certainly not. I respectfully agree with the observations of Lord Mackenzie that "with regard to the practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Court is concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not." The estimated assessment is a mere guess. Who is to determine whether the guess is a reasonable one or not? Under section 23 (4) the Income-tax Officer is the *persona designata* to make the assessment, and from an assessment so made

(3) (1911) K. B. 424.
(4) (1910) 2 K. B. 178.
(5) 4 I. T. C. 182.
(6) 6 Tax. Cas. 115.

no appeal lies. If an assessment under section 23 (4) is made by the Income-tax Officer *mala fide*, and is "arbitrary" in the sense that I first indicated, it cannot be doubted, I imagine, that the Commissioner would exercise the power of review with which he is entrusted under section 33. But, in my opinion, an assessment made by the Income-tax Officer under section 23 (4), unless it is cancelled under section 27, or set aside under Sec. 31 or Sec. 33, is made final and conclusive under the provisions of the Act.

I must now refer once more to the decision of the Special Bench in *S. P. K. A. A. M. Chettyar Firm* v. *Commissioner of Income-tax*[5] in which it was held by this Court (1) that the Income-tax Officer in making an assessment under section 23 (4) must exercise a "judicial discretion" and, therefore, the question whether he had exercised his discretion in a judicial manner or not was a question of law; and (2) that such a question of law would or could arise out of an order of the Assistant Commissioner under section 31 dismissing an appeal against the refusal of the Income-tax Officer to cancel an assessment under section 27. Their Lordships prayed in aid of their decision the following passage from the judgment of the Special Bench in *A. R. A. N. Chettyar Firm* v. *Commissioner of Income-tax*,[7] "Though the Income-tax authorities have in my judgment rightly assessed the firm under section 23 (4) of the Indian Income-tax Act, the question at issue was whether they had rightly done so, and the Commissioner was justified in referring that objection to this Court for a ruling. It would not be in the interests of justice to put such a construction on the proviso to section 30 (1) as to prevent this Court from enquiring into the case submitted whether the Income-tax authorities had acted legally in assessing under section 23 (4)."

In my opinion, however, with all due respect to the learned Judges who decided that case, the decision in *S. P. K. A. A. M. Chettyar Firm* v. *Commissioner of Income-tax*[5] cannot be supported on either point. How it can be supposed that an Income-tax Officer, when making an assessment under section 23 (4), is exercising a "discretion" similar to that exercisable by the licensing Justices to which the memorable observations by Lord Halsbury in *Sharp* v. *Wakefield*[8] were applied I confess that I find it difficult to understand. When it is said that a tribunal is invested with a "judicial discretion" what is meant is that in certain proved or admitted circumstances it has been given the power to act or not to act in a particular way. Such a discretion, no doubt, "must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself;" *Wilson* v. *Rastall*.[9] So in *Reg.* v. *Boteler*[10] where Justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone (per Lord Halsbury ibid p. 179). In like manner the Court has a discretion with respect to the payment of costs, and as to whether a receiver should or should not be appointed, or an injunction granted. It is unnecessary to multiply instances in which the Court is regarded as invested with a "discretion" which it must exercise judicially. For the purposes of this case it is important to bear in mind that in every case in which a tribunal

(7) 2 I. T. C. 477.
(8) (1891) A. C. 179.
(9) 4 T. R. 757.
(10) 33 L. J. M. C. 101.

is bound to exercise a "judicial discretion" power has been confided to the tribunal to act or refrain from acting in a particular way in certain proved or admitted circumstances.

Has the Income-tax Officer any such "discretion" when making an assessment under section 23 (4)? In my opinion, none at all.

If the assessee has failed to comply with the provisions of the Act, and thus has brought himself within the ambit of section 23 (4), the Income-tax Officer "shall make the assessment." He has no discretion in the matter. Whether or not the default of the assessee is such that the provisions of section 23 (4) are brought into play is a question of fact and not of law, and if on the facts the case is within the section 23 (4), the Income-tax Officer is bound to make the assessment as best he can. Under the proviso to section 30 (1) "no appeal shall lie in respect of the assessment made under sub-section (4) of section 23 or under that sub-section read with section 27," and, in my opinion, on a reference under section 66 to hold that "it would not be in the interests of justice to put such a construction on the proviso to section 30 (1) as to prevent this Court from enquiring into the case submitted whether the Income-tax authorities had acted legally in assessing under section 23 (4)," is to run counter to the express terms of the proviso to section 30 (1), and is quite unwarrantable if it purports to be a statement of the law, *Duni Chand* v. *Commissioner of Income-tax.*[11] Again, with all deference, I fail to understand how it can reasonably be held or contended that such an alleged question of law as that which I have ventured to criticise arises or can arise out of an order of the Assistant Commissioner under section 31, dismissing an appeal from the refusal of the Income-tax Officer to cancel an assessment under section 27. Under section 27 the issue is one essentially of fact, namely, whether the assessee "was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the last mentioned notices." If he satisfies the Income-tax Officer that he was not in default the Income-tax Officer "shall cancel the assessment." In an appeal under section 30 (1) against the refusal of the Income-tax Officer to make a fresh assessment under section 27 the only question that arises is the same question of fact as that which fell to be determined by the Income-tax Officer under section 27, and in such an appeal it is immaterial whether the assessment made under section 23 (4) was valid or not: *A. K. R. P. L. A. Chettyar Firm* v. *Commissioner of Income-tax.*[12] The only question of law that could arise is whether there were any materials upon which the Income-tax Officer or the Assistant Commissioner could find that there was no sufficient cause excusing the assessee from complying with the requirements of the law, as prescribed in section 27. In *A. K. R. P. L. A. Chettiyar Firm* v. *Commissioner of Income-tax, Burma,*[13] the Court held that in that case the sole question of law that could arise was:—"Was there any evidence upon which the Assistant Commissioner could find that there was no sufficient cause preventing the assessee from producing the Shan States account on the 20th November 1919?" In the circumstances of that case I think that what was there held to be the sole question of law that could arise was correctly stated, but I wish to add that, of course, in a proceeding under

(11) 4 I. T. C. 33.
(12) 5 I. T. C. 187.
(13) 5 I. T. C. 182.

section 27 the onus lies upon the assessee, and if the assessee fails to produce any evidence in support of his application that the assessment made under section 23 (4) should be cancelled, that in itself would provide material upon which the Income-tax Officer would be justified in basing a refusal to cancel the assessment that had been made under section 23 (4). On the other hand, if the assessee adduced evidence in support of his application under Sec. 27 the weight to be attached to that evidence is a matter for the Income-tax Officer to determine.

In *P. K. N. P. R. Chettyar Firm* v. *Commissioner of Income-tax*[14] and in *Commissioner of Income-tax* v. *P. K. N. P. R. Chettyar Firm*,[15] in which the learned Judges followed and applied the law as laid down in *Commissioner of Income-tax* v. *S. P. K. A. A. M. Chettyar Firm*,[5] it was held that "the Income-tax Officer under section 27 has a discretion. This discretion consists of a power to decide whether the cause shown is or is not sufficient" (per Ormiston J., in *Commissioner of Income-tax* v. *P. K. N. P. R., Chettyar Firm*[15]), and therefore, the Court held that the question whether the Income-tax Officer exercised his discretion under section 27 judicially was a question of law that arose out of the order of the Assistant Commissioner on appeal from the refusal of the Income-tax Officer to cancel the assessment under section 27. In *P. K. N. P. R. Chettyar Firm* v. *Commissioner of Income-tax*[14] the learned Judges, in support of the view that they expressed referred to section 5 of the Limitation Act, and Order 9, Rule 9, and Order 41, Rule 19, of the Code of Civil Procedure. But in section 5 of the Limitation Act a discretion is expressly confided to the Court to grant or refrain from granting an extension of time, and under the Code itself a right of appeal is provided in respect of orders rejecting an application made under Order 41, Rule 19, or Order 9, Rule 9.

Under section 27, however, the Income-tax Officer has to determine whether the assessee was prevented by sufficient cause from complying with the requirements of the law as set out in section 27. That is essentially a question of fact, and not of law. If the assessee satisfies the Income-tax Officer that in the circumstances of the case he was prevented by sufficient cause from complying with the requirements of the law as prescribed under section 27, it is provided that the Income-tax Officer "shall" cancel the assessment. He has no option or discretion in the matter. For these reasons, in my opinion, the law on this subject enunciated in *Commissioner of Income-tax* v. *A. R. A. N. Chettyar Firm*,[7] *S. P. K. A. A. M. Chettyar Firm* v. *The Commissioner of Income-tax*,[5] *P. K. N. P. R. Chettyar Firm* v. *The Commissioner of Income-tax*,[14] and *Commissioner of Income-tax, Burma*, v. *P. K. N. P. R. Chettyar Firm*,[15] was incorrectly laid down, and these cases *pro tanto* must be regarded as overruled. Under section 66 (2) the assessee as therein provided may require the Commissioner of Income-tax *inter alia* "to refer to the High Court any question of law arising out of an order of the Assistant Commissioner under section 31," and if the Commissioner refuses to state a case on the ground that no question of law arises, under section 66 (3) on the assessee's application the High Court "may require the Commissioner to state the case and to refer it." Inasmuch as the question whether an assessment made by the Income-tax Officer under section 23 (4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under section 31, it follows that such a question cannot be made the ground for an order

(14) 4 I. T. C. 87.

(15) 4 I. T. C. 340.

by the High Court under section 66 (3) requiring the Commissioner to state a case. For the reasons that I have stated I am of opinion that the answer to each of the questions propounded is in the negative.

DAS, J.:—I agree.
MAUNG BA, J.:—I agree.
MYA BU, J.:—I agree.

DUNKLEY, J.:—I agree with my Lord the Chief Justice. A judicial discretion premises that the officer, in whom the discretion is vested, has authority, in his judgment, to do or not to do a certain act, and in this sense the Income-tax Officer has no discretion under sub-section (4) of section 23 of the Income-tax Act. The sub-section places upon him the positive duty of making an assessment; he has no authority, in his discretion, to make or to refuse to make an assessment. The assessment made under this sub-section is necessarily arbitrary because it is based on incomplete materials. But to say that because the Income-tax Officer has to make the assessment "to the best of his judgment" a question of law is raised as to whether he had any materials on which to base his judgment is equivalent to saying that every *ex parte* order involves a similar question of law. The expression "to the best of his judgment" means nothing more than "as best he can." It has to be borne in mind that sub-section (4) of section 23 is a penal clause, in the sense that if the assessee had complied with the legitimate requirements of the Income-tax authorities he would not have been liable to this mode of assessment, and therefore it does not lie in his mouth to complain that it is arbitrary.

An assessment under section 23 (4) cannot be brought before the High Court under the provisions of section 66 (3) of the Income-tax Act. It is clear from the wording of that sub-section that the High Court can only require the Commissioner of Income-tax to state a case which he might have stated under sub-section (2) of section 66. The words "if it is not satisfied as to the correctness of the Commissioner's decision," occurring in sub-section (3), plainly refer to the Commissioner's decision under sub-section (2), and therefore the High Court can only require the Commissioner to refer a question of law which he has already been required by the assessee to refer, by an application under sub-section (2), and which he has refused to refer. Hence the only matters which can possibly be brought before the High Court under section 66, sub-sections (2) or (3), are matters arising out of an appellate order of the Assistant Commissioner, passed under section 31 (3), or an appellate order of the Commissioner passed under section 32 (3).

The proviso to section 30, sub-section (1), prohibits in terms an appeal against an assessment made under section 23 (4), but an appeal is allowed against an order of the Income-tax Officer, passed under section 27, refusing to cancel an assessment made under section 23 (4) and to make a fresh assessment. Therefore the only question arising in connection with an assessment under section 23 (4), which can come before the Assistant Commissioner on appeal, is whether the Income-tax Officer was justified in refusing to cancel the assessment.

It follows that a question arising from the actual assessment under section 23 (4) cannot be brought before the High Court under the provisions of section 66, sub-sections (2) or (3), under any circumstances. The

only question in any way connected with such an assessment which could be raised before the High Court would be a question of law arising out of the Income-tax Officer's order under section 27, refusing to cancel the assessment under section 23 (4) and to make a fresh assessment. Under the provisions of section 27, that order must be based on a finding that the assessee was not prevented by sufficient cause from making the return required by section 22, or complying with the terms of the notices issued under section 22 (4) or section 23 (2), as the case may be, and the only question of law which could possibly arise out of such a finding is whether there were any materials on which the Income-tax Officer could base his finding.

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(447) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Niyogi, Additional Judicial Commissioner.

(26th March, 1931)

Chunilal Nathmal .. *Assessee.*

v.

The Commissioner of Income-tax, Central Provinces and Berar. .. *Referring Officer.*

Indian Income-tax Act (XI of 1922) Secs. 10, 23 (4) and 66 (3)—Money lending business—Estimate assessment for non-production of accounts—Legal basis therefor, if question of law for reference.

The assessee carrying on money-lending business in Bombay, Nagpur, and Bhikaner, on non-production of Bhikaner accounts called for, was assessed under Sec. 23 (4) of the Act, the assessed income including a sum of Rs. 12,000 estimated as interest receipts not accounted for in books. The assessee while admitting the receipt as interest of a sum of Rs. 10,341 not shown in his return contended that there was no legal basis for the additional estimated interest receipt of Rs. 12,000 based on reasonable probability only and not on certainty. On an application to the Court under Sec. 66 (3) of the Act.

HELD, that on the materials on record the Income-tax authorities were perfectly justified in drawing such an inference as they in the exercise of their discretion thought reasonable and that there was no question of law for reference to the Court.

Application [Miscellaneous Judicial Case No. 2-B of 1930] made under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Central Provinces and Berar to state a case for the opinion of the Court.

G. R. Deo, for the Assessees.
D. N. Choudhary, for the Crown.

JUDGMENT.

The applicant Chunilal Nathmal has moved this Court under section 66 (3) of the Income-tax Act of 1922 for a mandamus to be issued to the Commissioner of Income-tax requiring him to state the case with reference to question No. 4 of his application made under section 66 (2), Income-tax Act. The question is, "Is the assessee liable to be assessed on the sum of Rs. 12,000 as there is no legal basis whatsoever for the conclusion that

the assessee received that income during the assessment year, it being admitted that there is only reasonable probability that the income may have been received, but there is no certainty that it was so received?"

2. For the year 1927-28 the assessee returned a loss of Rs. 22,264. As, however, he was assessed on a profit of Rs. 49,966 in the preceding year, he was called upon to produce his account books. Both his Bombay and Nagpur account books disclosed the existence of a khata in the name of Chunilal Kothari of Bikaner containing excess credits of varying amounts. On demand for production of Bikaner account books, the assessee declined to produce them. The Income-tax Officer had consequently to make the assessment under section 23 (4), Income-tax Act. The item pertinent to this application is that of Rs. 12,000, the sum added as interest receipts. The Income-tax Officer received information as to the actual receipt of Rs. 10,341 as interest by the assessee, but was not accounted for in the books; the assessee being confronted had to admit the receipt. The Income-tax Officer, therefore, estimated the remaining interest receipts at Rs. 12,000.

3. It is noticeable that the assessee has been persistently evading disclosure of his interest receipts. He has branch shops at Bombay and Bikaner and his books disclosed that he advanced large sums of money in the names of Chunnilal Kothari and Nathmal Chunnilal. Although the interest in the name of the former is shown as such in the books of Nandora in Bombay shops, that received in the name of Nathmal Chunnilal does not appear in the books. The reason assigned for the omission is that the interest receipts relate to the transactions of the Bikaner shops and have nothing to do, and are not connected, with the transactions in British India. It must be observed that there is an admission that the receipts are derived from the debtors residing in British India. In the previous year these interest receipts were estimated at Rs. 13,000 and the assessee accepted the estimate apparently without demur.

4. The question is whether the estimate of Rs. 12,000 raises any question of law. It is now an admitted fact that the assessee received a sum of Rs. 10,341 but failed to return. This itself is a sufficient material for the assumption that he has received large sums which are left unaccounted for. Determination of the actual amount not accounted for depends upon the consideration of the various factors. The broad fact stands that the returns made by the assessee are unreliable. It is for the assessee to place all relevant materials at the disposal of the Income-tax authorities. He having failed to discharge the onus which lay on him, the Income-tax authorities were perfectly justified in drawing such inference as, on the materials on record, they, in the exercise of their discretion, thought reasonable. There is nothing to the contrary which serves to show that the discretion has been exercised in an unreasonable manner. Even the question itself concedes that there is a reasonable probability that the income may have been received. It is urged that what is reasonable probability is not necessarily certain. To my mind it makes no difference whether it is called certainty or reasonable probability. It is the well-established rule of evidence to regard what is reasonably probable as being a certainty. I fail to observe any question of law in the point submitted to this Court: *Sir Hari Singh Gour* v. *The Commissioner of Income-tax, Central Provinces and Berar.*[1]

5. The application fails. The applicant will bear the costs of these proceedings. Pleader's fee will be Rs. 75.

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(1) 3 I. T. C. 350.

(448) *PRIVY COUNCIL.*

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Lord Macmillan, Lord Salvesan and Sir George Lowndes.

(26th March, 1931)

The Pondicherry Railway Co. Ltd. .. *Appellant.*

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922) Secs. 4 (1) and 10 (2)—Pondicherry Railway Company Ltd.—Company registered in England—Concession from French Government for constructing line in French territory—Agreement with South Indian Railway Co. for working the line—Revenue collected, accounts kept and profits determined in British India—Income, if received in British India—Net profits payable to French Government under concession, if deductable.

The Pondicherry Railway Co. Ltd. incorporated in England with its registered office, Secretary and Board of Directors in England constructed a railway line entirely within the French territory in India under a concession from the French Colonial Government in consideration inter alia of making over to the latter one half of the net annual profits of the line ascertained in a specified manner. The Company entered into an agreement with the South Indian Railway Co. whereby the latter undertook to work, manage and maintain the railway line with their own staff, rolling stock, plant etc., as an integral part of their (South Indian Railway's) undertaking and from time to time to pay the gross receipts of the line into specified Government Treasuries in British India. After deducting from the gross receipts certain specified expenditure and a percentage worked on mileage basis to cover working and maintenance charges, the balance was to be ascertained and paid every six months by the South Indian Railway Co. in India in rupees.

The Agent of the South Indian Railway Co., as Agent of the Pondicherry Company on an honorarium kept the accounts of the Pondicherry Company at Trichinopoly with an office bearing their name and after determining the net profits payable to the Pondicherry Company under the agreement and paying thereout the share due to the French Colonial Government, remitted the balance to the Pondicherry Company in London by a draft on London.

On an assessment made on the Agent, South Indian Railway Co. as agent of the Pondicherry Railway Co. the latter contended that there was no receipt of any income in British India from any business carried on there assessable under Sec. 4 (1) of the Income-tax Act and that in any event the amounts payable to the French Government should be deducted in computing the assessable income. On a reference under Sec. 66 (2) of the Act, the High Court held that the Company was carrying on business in British India and was assessable on the income derived from the working of the railway under Sec. 4 (1) as income accruing, arising or received in British India and that the yearly payment made to the French Government was a distribution of profits and not an allowance deductable in the assessment of Company's profits.

On appeal by the Company to the Privy Council

HELD, dismissing the appeal with costs, that the appellant was liable to be assessed to income-tax under Sec. 4 (1) on the income derived by it from the payments made to it by the South Indian Railway Co., in respect of the working of the Pondicherry Railway as being income received in British India by the appellant from the carrying on of its business and that in computing the assessable profits or gains of the business no allowance was deductable in respect of the halfshare of the net profits payable by the appellant to the French Colonial Government.

Appeal [Privy Council Appeal No. 94 of 1930] from the judgment and orders of the High Court of Judicature at Madras [Coutts Trotter, C.J., Odgers and Beasley, JJ.] dated the 26th March and 1st May 1929 reported as 3 I. T. C. 485.

Sir John Micklethwait, K.C., and *John S. Scrimgeour*, for the Appellants.
Dunne, K.C., and *R. P. Hills*, for the Crown.

JUDGMENT.

LORD MACMILLAN:—For the years 1925-26 and 1926-27 assessments to income-tax and super-tax under the Indian Income-tax Act, 1922 (No. XI of 1922) were made on "The Agent, Pondicherry Railway Company, Limited, Trichinopoly," in respect of the income derived by the company from its business. On appeal these assessments were confirmed by the Assistant Commissioner of Income-tax, Southern Range, Madura. The assessee thereupon under section 66 (2) of the Act required the Commissioner of Income-tax for the Province of Madras to refer to the High Court of Judicature at Madras certain questions of law arising with regard to the validity of the assessment. The Commissioner accordingly stated a case in which he referred for the decision of the Court four questions of law, three only of which it is necessary to set out here, viz.:—

(b) Whether the Pondicherry Railway Company, Limited, which is resident without British India is liable to be assessed to income-tax on the income derived by it from the working of the Pondicherry Railway under section 4 of the Indian Income-tax Act as income accruing or arising or received in British India?

(c) Whether the Pondicherry Railway Company carries on business in British India within the meaning of the Income-tax Act?

(d) Whether in any event the income of the said Company that is liable to assessment to income-tax is only that portion which is payable to it under the concession between it and the French Colonial Government?

The Commissioner, as required by the Act, stated his opinion on the questions referred which was to the effect that questions (b) and (c) fell to be answered in the affirmative and question (d) in the negative.

In the High Court the learned Chief Justice (Sir Murray Coutts Trotter) was of opinion that questions (b) and (c) should be answered in

the negative, but the majority of the Court (Odgers and Beasley, JJ) were of opinion that these questions should both be answered in the affirmative. This accordingly became the decision of the Court. As regards question (d) the Court was unanimously of opinion in the negative.

The assessments having thus been upheld the Court under section 66-A (2) of the Act certified the case to be a fit one for appeal to his Majesty in Council and it has now been heard by their Lordships on the assessee's appeal.

It is necessary to set out in some detail the material facts. The Pondicherry Railway Company Limited was incorporated in the United Kingdom in 1869 under the British Joint Stock Companies Acts for the purpose of constructing a railway in the French Colony of Pondicherry. The registered office of the company has always been in London. In the year 1878 the company entered into a convention with the Minister of Marine and Colonies acting on behalf of the French Colony of India whereby a concession was granted to the company to construct and work a line of railway from the landing pier at Pondicherry to a junction with the South Indian Railway at the frontier of the French territory. The duration of the convention was fixed at 99 years and the company thereby undertook to construct and work the proposed railway, or to cause the same to be constructed and worked, and assumed various obligations in regard to it. In consideration of the company's engagements the French Minister undertook to pay to the company in instalments a subsidy of 1,264,375 francs and to provide the requisite land free of charge. The convention further provided as follows:—

"The Company undertakes on its part to make over to the Colonial Government during the whole duration of the concession one half of the net profits which shall be arrived at by deducting from the gross receipts the rates and taxes of every kind chargeable to the Company as well as the amount expended in the purchase or hire of rolling stock, the expenditure relating to the maintenance and repair of the lines, of fixed plant and rolling stock, expenses of working and administration, as well as such sums if any, as with the consent of the Colonial Government may be placed to reserve to cover the costs of heavy repairs of the works of the railway and for the renewal of the 'material'. But this division shall not commence until after deduction by the Company of a sum of one hundred and fifty-seven thousand five hundred francs (157,500 francs) from the aggregate amount of the net profits during the first years of the working of the line; and this by way of reimbursement for the expenses of administration for which the Company has made itself liable."

The Company duly constructed the projected line of railway, which was entirely situated in French territory, and effected the junction at the frontier with the system of the South Indian Railway As empowered in the convention with the French Minister the company entered into an agreement dated the 25th March, 1879, with the South Indian Railway Company Limited whereby the latter undertook to work, manage and maintain the Pondicherry Railway. The agreement in force between the two railway companies at the time of the assessments in question was dated the 30th December, 1890. Such agreements between an owning company and a working company are familiar in railway practice and may take various forms. Examples which have come before the Courts are discussed in their legal bearings in *Sevenoaks etc., Railway Co.* v. *London, Chatham and Dover*

Railway Co.,[1] *South Behar Railway Co.* v. *Inland Revenue Commissioners*,[2] *Inland Revenue* v. *Edinburgh and Bathgate Railway Co.*,[3] and *Inland Revenue* v. *Dublin and Kingston Railway Co.*[4] The working agreement in the present case is on simple lines. The South Indian Company undertakes to work the Pondicherry line "as if it were an integral part of their undertaking" and from time to time to pay the gross receipts of the line "into such Government Treasury in India as the Secretary of State may prescribe." It is then provided that "out of the gross receipts of the Pondicherry line there shall be deducted and retained by the South Indian Company for working expenses the same percentage of gross receipts as the traffic of the South Indian Company, including therein the Pondicherry line, is from time to time worked at." After deduction of this percentage for working expenses from gross receipts "the balance shall be ascertained and .....shall be paid over every six months by the South Indian Company in India in rupees." Provision is made for dividing between the two companies on a mileage basis the gross receipts from through traffic.

The following paragraphs taken from the stated case indicate the manner in which the terms of the agreement are carried out in practice:—

"10. The Agent of the South Indian Company which is managing its affairs in India keeps accounts at Trichinopoly to show the receipts and expenses of the Pondicherry line and determines the net receipts payable to the Pondicherry Company according to the agreement with that company.

11. The Petitioner, Mr. Percy Rothera, who is the agent of the South Indian Company, is also the agent of the Pondicherry Company and is addressed by the Secretary of the latter company in London as such.

12. Mr. Rothera receives at Trichinopoly on behalf of the Pondicherry Company the profits due to it in accordance with the terms of the agreement with the South Indian Company. This will be seen from the correspondence annexed, Exhibits C and D. Under instructions from the Board of Directors in London of the Pondicherry Company he remits the share of profits due under the Convention to the Colonial Government at Pondicherry and remits the balance to the Pondicherry Company in London.

13. Mr. Rothera as the agent of the Pondicherry Company carries on correspondence with the Directors of the Company in London on matters connected with the working of the Convention and the agreement, such as alterations in rates of fares, the preparation of the accounts of the Company and the payment of the share of profits due to the French Colonial Government. He receives an honorarium of £21 a year from the Pondicherry Company, 'for services rendered'.

14. The Chief Engineer and the General Traffic Manager of the South Indian Company are also *ex-officio* officers of the Pondicherry Company and receive an honorarium of £10-10s. each. The Revenue accounts of the Pondicherry Company are prepared by the Chief Auditor of the South Indian Company acting as Chief Auditor of the Pondicherry Company.

15. The Pondicherry Company has an office at Trichinopoly with a sign-board."

(1) (1879) 11 Ch. D. 625.

(2)) 12 Tax Cas. 657; (1925) A. C. 476.

(3) (1926) S. C. 863.

(4) (1926) 5 A. T. C. 721.

Exhibit C is a letter dated the 5th April, 1923, addressed from London by the Secretary of the Pondicherry Company to Mr. Scott (Mr. Rothera's predecessor), "Agent, Pondicherry Railway Co., Ltd., Trichinopoly," enclosing a statement of the expenses of administration of the company in England for the year. The letter proceeds:—

"The figures now furnished will enable you to prepare the Revenue account for the year ending 31st March, 1923, showing the amount of net profits divisible between the French Colonial Government and the Company. When this has been done you will be good enough to pay over to the French authorities the moiety of the net profits in terms of Article 6 of the Convention and to remit by Demand Draft to the Board the balance due to the Company."

Exhibit D is the reply of Mr. Scott, dated the 30th May, 1923. It is headed "Pondicherry Railway Company Limited (Incorporated in England), Agent's Office, Trichinopoly", and Mr. Scott appends the word 'Agent' to his signature. In the letter he reports that in conformity with the instructions received he has sent a cheque for Rs. 12,498-12-2 to the treasurer of the French establishments in India and he encloses as the share of the Pondicherry Railway Board a Demand Draft on the National Bank of India for £ 1,237-9s.-5d., the equivalent of Rs. 18,525.

A specimen Demand Draft exhibited to their Lordships was drawn by the National Bank of India at Madras on their London office to the order of the Secretary of the Pondicherry Railway Company.

An affidavit by Mr. Rothera was filed in the Court of the Assistant Commissioner of Income-tax in which he stated *inter alia* that the letters from London addressed to him as agent of the Pondicherry Company related to instructions and orders of the London Board on questions of policy, increase or decrease of rates, the company's relationship with the French Government, or the preparation of accounts for the company in London, but had no relation to the actual working of the line. He further stated that he did not control the affairs of the Pondicherry Company but in all that he did on their behalf acted under the instructions of the Board in London where the accounts of the company were maintained; everything that he did in the actual management and working of the line was done by him in his capacity as agent of the South Indian Railway Company.

Turning now to the terms of the Indian Income-tax Act their Lordships find there enacted in section 4 (1) that the statute is to "apply to all income, profits or gains as described or comprised in section 6, from whatever source derived, accruing or arising or received in British India." In section 6 the heads of income, profits and gains chargeable to income-tax are set out in six categories, of which the fourth is "Business". It is under this head that the appellant company has been assessed. Section 10 enacts that "the tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him" and prescribes that such profits or gains shall be computed after making allowance for *inter alia*" (ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." "Business" is defined in section 2 (4) as including "any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

In the Court below the question whether the assessed income of the Pondicherry Company accrued or arose in British India within the meaning of the Act was much discussed, and the opinion of the majority of the Judges as embodied in the order of the Court of 26th March, 1929, was that it did so accrue. Their Lordships do not find it necessary to pronounce upon this aspect of the case and have come to no conclusion with regard to it, for they are satisfied that the income in question was "received" in British India within the meaning of the statute, which is sufficient for the determination of the company's liability.

The argument presented by Mr. Micklethwaite for the appellants was to the effect that the facts when critically examined demonstrated that Mr. Rothera was not the agent of the company to receive payment on their behalf from the South Indian Company but was merely their agent to transmit payment to the Board in London. He submitted that it was the company in London which received payment from the South Indian Company, not Mr. Rothera in Trichinopoly. The same sum could not be received twice and if it was truly received in London it could not be received also in Trichinopoly. The transmission of the Pondicherry Company's share of the gross receipts in the form of a draft on London, payable only in London, showed that Mr. Rothera's function was limited to that of a mere channel of communication, or, in the phrase of the Chief Justice, to that of "a mere post-office."

In their Lordships' view the facts do not support this contention. In the stated case it is found as a fact that "Mr. Rothera receives at Trichinopoly on behalf of the Pondicherry Company the profits due to it in accordance with the terms of the agreement with the South Indian Company." This may no doubt be regarded as a mixed finding of fact and law if the word "receives" is used in the statutory sense, but it is at least a finding of fact that payment is made to Mr. Rothera at Trichinopoly. Nothing is due to the Pondicherry Company under the agreement with the South Indian Company until the latter has ascertained the gross receipts which the traffic on the Pondicherry line has yielded and has deducted therefrom the prescribed percentage for working expenses. This calculation is effected at Trichinopoly in the office of the South Indian Company. The balance then becomes due and payable to the Pondicherry Company "in India in rupees." Mr. Rothera no doubt doubles the parts of agent of the Pondicherry Company and agent of the South Indian Company, which has led to some confusion of functions, but when his roles are disentangled it is clear that when as agent for the South Indian Company he has ascertained the sum due to the Pondicherry Company he transfers it to himself as agent for the latter company, for thereafter he proceeds to deal with it as instructed on behalf of that company. He does not merely transmit to London a sum of money payable to the Pondicherry Company by the South Indian Company. He has to apportion the sum so payable between the Pondicherry Company and the French Government in terms of the Convention and this is not a mere matter of dividing it by two, for, as appears from Exhibit D, the share remitted to London is not the same as the share remitted to the French Government. It is one half of the net profits as ascertained in terms of the Convention that the French Government receives and the computation of this half involves calculation on the part of Mr. Rothera as the agent of the Pondicherry Company. He is instructed from London to "pay over to the French authorities" their moiety. How he can obey this instruction and pay over what, on the appellants' submission, he

has not received requires for its appreciation a metaphysical subtlety remote from the prosaic realm of income-tax law. How, it may also be asked, can he purchase a draft on London unless he has the wherewithal to pay for it? The attempt to present Mr. Rothera as an animated post office fails when it is realised that his functions far transcend the mere mechanical act of transmitting a sum to its recipient. He is the paid agent at Trichinopoly of the Pondicherry Company, carrying on their agency in an office bearing their name and he is entrusted with the important duties on their behalf which he himself describes in his affidavit and which are set out in the stated case, not the least important of which is to see to the carrying out of the financial arrangements between the Pondicherry Company on the one hand and the South Indian Company and the French Government on the other hand. If there is no receiving of money by the Pondicherry Company until it is received in London then the remarkable result follows that of the sum payable by the South Indian Company to the Pondicherry Company a substantial part is never received by the latter company at all, for the portion diverted by Mr. Rothera to the French Government is never received in London and if it is not received in Trichinopoly it is apparently nowhere received by the Pondicherry Company. It certainly is not paid by the South Indian Company to the French Government, for there is no privity between them, and if it is paid, as it is, by Mr. Rothera to the French Government it can only be paid by him after he has received it. Moreover, the agreement with the South Indian Company requires that Company to make payment to the Pondicherry Company "in India in rupees." It may be that this might be complied with by a payment made in French India, although their Lordships express no opinion on this point, but at least it is clear that it would not be complied with by a payment in London.

Their Lordships accordingly are of opinion that the income derived by the Pondicherry Company from the payments made to it by the South Indian Company is, on the facts stated, received in British India, within the meaning of the Act, by the agent of the Pondicherry Company there on their behalf.

That these payments constitute profits or gains of a "business" carried on by the Pondicherry Company was scarcely contested and their Lordships, following the decision in the *South Behar Railway Company* v. *Inland Revenue Commissioners*,[1] have no hesitation in so finding. It is unnecessary to go on to consider whether the business is carried on in British India, which is the form which question (c) takes, for it is enough if the profits of a business carried on by the assessee are received in British India and the place where the business is carried on is not material. The appellants expressed themselves as desirous that the question of where their business is carried on should be left open, in view of the possible ulterior consequences, and their Lordships make no pronouncement on the point.

Question (d) relates to the quantum of the assessment. The statute permits the assessee in computing the profits or gains of any business carried on by him to deduct "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." The Pondicherry Company is taken bound in the convention with the French Minister to "make over" to the Colonial Government "one half of the net profits" of the undertaking arrived at in the manner prescribed

(1) 12 Tax Cas. 657; (1925) A. C. 476.

in the Convention. It is claimed for the Company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The Court below has unanimously negatived this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits. It was persuasively argued that inasmuch as the Pondicherry Company as a condition of making any profits must pay over one half of them to the French authorities and could never itself reserve the whole profits the payment so made was of the nature of a rent payable by the Company or a charge on the undertaking. But the analogy in their Lordships' opinion is imperfect, and the form in which the parties have contracted that the French Government shall participate in the success of the undertaking precludes the deduction claimed. English authorities can only be utilised with caution in the consideration of Indian income-tax cases owing to the differences in the relevant legislation, but the principle laid down by Lord Chancellor Halsbury in *Gresham Life Assurance Society* v. *Styles*,[2] is of general application unaffected by the specialities of the English tax system. "The thing to be taxed," said his Lordship, "is the amount of profits or gains. The word 'profits' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits or the charge which has been made on those profits by previous agreement or otherwise is perfectly immaterial. The tax is payable upon the profits realized and the meaning to my mind is rendered plain by the words 'payable out of profits'."

Their Lordships thus find themselves in agreement with the result of the judgment of the High Court on all material points, but they are not prepared to follow the course adopted below of answering categorically the questions posed in the stated case, which have not been so framed as to enable their Lordships by affirmative or negative answers to express their opinion upon the topics to which they desire to confine their decision and on which alone it is necessary to pronounce for the purpose of determining the appellants' liability. Their Lordships will accordingly humbly advise His Majesty that the order of the High Court of the 26th March, 1929, be varied by deleting therefrom the following words:—"And this Court by a majority being of opinion that the profits and gains of the Pondicherry Railway Company accrued in British India and hence it is liable to be taxed and that the said Company carried on business in British India within the meaning of the Indian Income-tax Act doth answer questions (b) and (c) in the affirmative," and substituting therefor the following:—"This Court doth declare in answer to questions (b) and (c) that the Pondicherry Railway Company, Limited, is liable to be assessed to income-tax for the years 1925-26 and 1926-27 under section 4 (1) of the Indian Income-tax Act on the income derived by it from the payments made to it by the South Indian Railway Company, Limited, in respect of the working of the Pondicherry Railway as being income received in British India by the Pondicherry Railway Company, Limited, from the carrying on of its business."

(2) 3 Tax Cas. 185; (1892) A. C. 309.

And that the order of the High Court of the 1st May, 1929, be varied by deleting therefrom the following words:—"And this Court being of opinion that the yearly payment made to the French Colonial Government is a distribution of profits and not an allowance deductible from those profits doth answer in the negative question (d), viz., 'Whether in any event the income of the said Company that is liable to assessment to income-tax is only that portion which is payable to it under the concession between it and the French Colonial Government'" and substituting therefor the following:—"This Court doth declare in answer to question (d) in computing the profits or gains of the business carried on by the Pondicherry Railway Company, Limited, for the purpose of assessment to Indian Income-tax no allowance is deductible in respect of the half share of net profits payable by the Pondicherry Railway Company, Limited, to the French Colonial Government."

With these variations their Lordships will humbly advise His Majesty that the orders appealed from be affirmed and the appeal dismissed. The respondent will have his costs of the appeal.

Freshfields, Leese & Munns, Solicitors for the Appellant.

Solicitor to India Office, for the Commissioner of Income-tax.

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(449) IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

Before Mr. Staples, Additional Judicial Commissioner.

(11th April, 1931).

Dewan Bahadur Ballabhdas and Son .. *Assessees.*

v.

The Commissioner of Income-tax,
Central Provinces and Berar.

Income-tax Act (XI of 1922), Secs. 4 (1), 10 and 66 (3)—East India Cotton Association—Forward or Hedge contracts—Payments under fornightly settlements—If assessable as income—Bad debts—Disallowance as not proved—Question of law for reference.

The assessee, a member of the East India Cotton Association, received payments every fortnight according to the bye-laws of the Association in respect of contracts known as forward or hedge contracts. On an assessment of the excess of the amounts so received in the account year, the assessee contended that as there were still further adjustments to be made till the contracts were finally settled in the following year when he might have to make payments instead of receiving payments, the income therefrom could not be ascertained in the account year.

HELD, that the actual payment received on account of contracts still running would be assessable income and the assessee could not escape liability simply because he might incur loss on the same account in the following year.

Where the assessee gave no details beyond mere entries in the books of account about bad debts claimed to be written off, the Income-tax authorities were right in disallowing them as not proved to be bad and no question of law was involved therein.

Application [Miscellaneous Judicial Case No. 29 of 1930] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, Central Provinces and Berar to state a case for the opinion of the Court.

M. D. Kinkhede, for the Assessees.

D. N. Choudhari, for the Crown.

JUDGMENT.

This is an application under section 66 (3) of the Income-tax Act asking for an order directing the Commissioner of Income-tax to state a case for the decision of this Court.

The facts have been stated in the order of the Commissioner dated the 11th November, 1929, in which he refused to make a reference to this Court. The points raised are, first whether the sums of Rs. 1,18,366-9-0 and Rs. 18,540-10-0, which were admittedly received by the applicant on account of fortnightly settlements according to the by-laws of East India Cotton Association during the year, should be excluded; secondly, whether the Income-tax Department was right in refusing to allow the applicant to set off the sum of Rs. 31,340 which was due during the year, but which, as a matter of fact, could not be paid until after the Diwali holidays and therefore was not included by the taxing authorities in the year under assessment; and thirdly, whether the Income-tax Department was right in disallowing two sums, which the applicant alleged he wrote off as bad debts in his Malthone and Talapar shops. Another point has been mentioned as No. 2 in the application, but this seems to be a vague and general ground and really only a repetition of the first ground. Further as stated by the Commissioner in his order these forward contracts to which the first ground really relates had not been considered before when assessing the applicant, and therefore there can be no question about the former method of assessment with regard to those contracts.

As regards the first point, I am of opinion that the order of the Commissioner is correct. It is true that these profits were received on account of what were called forward or hedge contracts. It is also true that those contracts were not completed in the year under assessment, that is, there were still further adjustments to be made till they were finally settled some time during the following year. At the same time it is admitted that according to the by-laws of the East India Cotton Association fortnightly payments have to be made on these contracts. These payments are actual payments and not merely adjustments and the applicant has admitted that he did receive payments according to those rules and that by these fortnightly payments he did receive the larger sums noted above. It seems clear then these excess amounts which were actually received during the year must be considered as income. It is true that in the ensuing year the applicant might incur loss on these contracts and might have to make payments instead of receiving payments. Even if he had to do so, however, the fact remains that in the preceding year he received a very considerable income

A man cannot escape liability to income-tax on income received, because he may incur loss in a future year on the same account on which he had received that income in the year under assessment. If he incurred loss in the ensuing year, that, of course, would be taken into account when the income for that year is assessed, but he cannot escape liability for the income actually received during any one year, simply because he may incur loss on the same account in the following year. The cases cited by the learned counsel for the applicant, *Bansilal Abirchand* v. *Commissioner of Income-tax, C. P. and Berar,*[1] *Hall & Co.* v. *Inland Revenue Commissioners,*[2] *Sir S. M. Chitnavis* v. *Commissioner of Income-tax, C. P. and Berar*[3] and *Tora Gul Boi* v. *Commissioner of Income-tax,*[4] do not appear to be in point. In none of those cases is it laid down that income actually received in any one year can be exempted from taxation on the ground that the loss may be incurred in the following year. The fact that the contracts were not concluded will not, I think, make any difference, because it is admitted that actual payments were made on the contracts every fortnight. The payments actually received on account of a contract that is still running are no less good payments than payments received on a completed contract. I agree with the Commissioner in holding that the applicant has only put forward this contention to reduce his income under assessment so that he may not be liable for super-tax. I am of opinion that the view taken by the Commissioner is correct and there is no necessity for a reference on this point.

The contention about the sum of Rs. 41,340 that was not actually paid during the year cannot, I think, be accepted; that sum may have been due for transactions that had taken place during the year under assessment, but admittedly it was not paid during that year. The applicant said that he could not make the payment during the Diwali holidays. He should have taken care to make the payment before the holidays if he wished to have the amount deducted from the income of that year. Admittedly the payment was not made until after the close of the year. Therefore it cannot be taken into account in assessing that year's income. The applicant can no doubt get the amount deducted from his income in the following year.

Again as regards the bad debts of Rs. 4,297 and Rs. 7,131-6-6, I am of opinion that the order of the Commissioner is correct. The applicant was given several opportunities by the Income-tax Officer to give full information and to prove his accounts and he failed to do so. The mere entry in the books of the two shops that there were bad debts cannot be accepted without further particulars. It is true that according to *Sir S. M. Chitnavis* v. *Commissioner of Income-tax, C. P. and Berar,*[3] an assessee has power to write off bad debts but he must surely give full particulars of those debts and prove that such debts actually exist. In the present case as far as I can make out no details about the bad debts were given and no proof was given beyond the mere entries in the shop books. Even if the debts existed and were shown as bad debts now for the purpose of income-tax there would be nothing as far as I can see to prevent the applicant from recovering them subsequently. I agree with the Commissioner that these bad debts have not been proved and that no question of law is involved.

The application is, therefore, dismissed with costs and the Commissioner will not be called upon to state a case. I fix pleader's fees at Rs. 100.

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(1) 3 I. T. C. 57.

(2) [illegible]

(3) 3 I. T. C. 321.

(4) [illegible]

(450) IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Horace Owen Compton Beasley, Kt., Chief Justice, Mr. Justice Sundaram Chetty and Mr. Justice Stone.

(17th day of April, 1931).

A. Ct. Nachiappa Chettiar .. *Assessee.*

v.

The Commissioner of Income-tax, Madras .. *Referring Officer.*

Income-tax Act (XI of 1922) Sec. 2 (14)—Registration of firm in Burma—Assessment of partner to super-tax in Karaikudi—Partnership deed alleged inoperative—Unsuccessful application in Burma to cancel registration—Legality of super-tax assessment—Proper remedy.

Where a partner in a firm registered in Burma for the year 1927-28 on an application of co-partner under section 2 (14) of the Income-tax Act, on an assessment to super-tax in Karaikudi in respect of his share of the profits of the registered firm contended that the registration was illegal and invalid on the ground that one of the partners having died in August 1926, the deed of partnership became inoperative for registration and unsuccessfully applied to the Commissioner of Income-tax in Burma for cancellation of registration on that ground,

HELD, that the assessment was legal, the firm continuing to be a registered one and that the proper remedy of the partner contesting the legality of registration was to file a suit in Burma for declaration of its invalidity.

Case [O. P. No. 44 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras for the opinion of the High Court.

CASE.

1. Under section 66 (2) of the Income-tax Act I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court.

2. The petitioner is the managing member of a Hindu undivided family consisting of himself and his brother residing at Alagapuri in the Ramnad District within the jurisdiction of the Income-tax Officer, I Circle, Karaikudi. The petitioner carries on business in British India and is a partner in two firms carrying on business under the vilasams C. T. A. S. M. and C. T. A. M. at Sitkwin and Minhla respectively in the Tharrawaddy District, Burma. For 1927-28 the Income-tax Officer, Tharrawaddy, registered these two firms under section 2 (14) of the Indian Income-tax Act, assessed them to income-tax and reported to the Income-tax Officer, First Circle, Karaikudi, the petitioner's shares of the profits of these two firms, viz., Rs. 35,368 and Rs. 97,200 respectively.

3. Thereupon the Income-tax Officer, I Circle, Karaikudi, levied from the petitioner super-tax amounting to Rs. 7,278-6-0 for 1927-28 on the basis of a total income of Rs. 1,58,227 as shown below:—

Property		Rs.	1,250
Business:			
Money lending at headquarters	Rs. 24,409		
Share of income from registered firms:			
C. T. A. S. M., Sitkwin	,, 35,368		
C. T. A. M., Minhla	,, 97,200		
		Rs.	1,56,977
Total income		,,	1,58,227
Less amount exempt		,,	75,000
Balance liable to super-tax		,,	83,227
Super-tax on Rs. 83,227	Rs. 7,278-6-0.		

A copy of the Income-tax Officer's order is filed marked—Exhibit A.*

4. The petitioner appealed to the Assistant Commissioner against the assessment of super-tax. His contentions were that the partnership at Minhla was constituted under an agreement dated the 29th July, 1922, entered into between Ct. A. Ct. Chidambaram Chetti, the petitioner's father, and one P. L. S. M. Muthukaruppan Chetti, that the petitioner's father having died on the 20th August, 1926, the partnership terminated on that date and the deed of partnership dated 29th July, 1922, became inoperative, that no fresh deed of partnership having been entered into in respect of the Minhla partnership there was no deed in force when the firm applied for registration for 1927-28 and that consequently the registration effected by the Income-tax Officer, Tharrawaddy, on 7th March, 1928, was void. He therefore claimed that the Minhla firm should have been assessed to super-tax as an unregistered firm by the Income-tax Officer, Tharrawaddy, and that no super-tax should have been levied at Karaikudi on the petitioner in respect of his share of the profits of that firm. The Assistant Commissioner dismissed the appeal on the ground that the question of the legality of the registration of the partnership of the Minhla firm was not one on which an appeal lay to him. A copy of his order is filed marked—Exhibit B.*

5. The petitioner has now applied to me to refer and state a case on two questions of law which are alleged to arise out of the Assistant Commissioner's order.

Question (1). Whether in the circumstances stated above, the registration of the firm in Minhla alleged to have been made in Burma under section 2 (14) of the Act is legally valid and operative. If the registration is held to be invalid, is it not incumbent on the Income-tax Officer under the Act to assess the firm to super-tax as a separate entity.

Question (2). Whether in the course of the assessment of your petitioner, he is estopped by law from questioning the validity of the registration and raising the plea of his non-liability to super-tax in respect of the share income of the firm.

*Not printed.

6. These questions are in my opinion irrelevant to a consideration of the real point at issue in this case. In computing the petitioner's total income the Income-tax Officer, Karaikudi, First Circle, was required by section 16 of the Act to include in that income the petitioner's share of the profit of the Minhla business. The firm at Minhla in which the petitioner was a partner had been registered by the Income-tax Officer, Tharrawaddy, Burma, on an application made to him by the firm in the prescribed form. The authority to whom an appeal lay against the registration of the firm was the Assistant Commissioner, Western Range, Rangoon. The Assistant Commissioner, Southern Range, Madura, in this Presidency had no power to cancel the registration even if he considered it invalid. Hence he did not consider the question of its validity, and that question is not one arising out of the Assistant Commissioner's order. The petitioner is therefore not entitled to have a case stated to the Madras High Court on this question.

7. Nor would an answer to the second question help the petitioner. Even if no estoppel prevents him from agitating the question whether the registration was valid, the authorities in this Presidency have no power to cancel that registration, or to direct that the firm be assessed to super-tax in Burma. So long as the registration remains uncancelled the profits of the firm are not liable to super-tax assessment according to Part II, Schedule II of the Indian Finance Act of 1927 while the petitioner's share of the firm's income is liable to super-tax assessment in his hands according to section 14 (2) read with section 58 of the Income-tax Act.

8. Therefore the question which in my opinion arises out of the facts of this case is as follows:—"Whether in the circumstances the Income-tax Officer was justified in assessing to super-tax the petitioner's share of the profits or gains of the Minhla firm, seeing that (whether or not it ought legally to be regarded as an unregistered firm) they had not as a matter of fact been assessed to super-tax" and I accordingly refer it for the opinion of their Lordships.

9. The petitioner apparently bases his claim to exemption from super-tax on the proviso to section 55. This proviso reads as follows: Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share. Under this proviso the petitioner would be exempt from liability to super-tax on his share of the profits of the Minhla firm only if the firm were an unregistered one and its profits and gains had been assessed to super-tax. In point of fact the firm is admittedly a registered firm and (whether the registration be legally valid or not) its profits have not been assessed to super-tax. The assessment of the petitioner's share of these profits to super-tax in his hands is therefore correct.

If the registration of the firm were to be cancelled by the Burma authorities, and the profits of the firm were to be subjected by them to super-tax, the question of amending the assessment now complained of would necessarily receive my attention. But as the facts stand at present it appears to me that the petitioner is entitled to no relief.

R. Kesava Iyengar, for the Assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The Income-tax Commissioner has referred to us the following question:—"Whether in the circumstances the Income-tax Officer was justified in assessing to super-tax the petitioner's share of the profits or gains of the Minhla firm, seeing that (whether or not it ought legally to be regarded as an unregistered firm) they had not as a matter of fact been assessed to super-tax."

The facts of the case shortly are these. The petitioner was a partner in a firm constituted under an agreement dated the 29th July, 1922, entered into between C. T. A. C. T. Chidambaram Chettyar, the petitioner's father, and one P. L. S. M. Muthukaruppan Chettyar. The petitioner's father died on the 20th August, 1926 and in 1927 the partnership, the partners of which were P. L. S. M. Muthukaruppan Chettyar and the petitioner, was registered in Burma under the Income-tax Act. One advantage of registration was that the registered partnership was no longer assessable to super-tax. Under these circumstances it was not so assessed; and the Income-tax authorities have here assessed the petitioner to super-tax. The petitioner who is a resident of Karaikudi objected to that assessment and appealed to the Assistant Commissioner of Income-tax and from him to the Commissioner who has referred the question before-mentioned for our consideration.

The contention raised by the petitioner both here and before the Commissioner of Income-tax is that the registration of this firm at Minhla by the Income-tax authorities there was illegal and invalid because at the date of the registration there was no partnership in existence, that is to say, that one of the partners having died, the partnership came to an end. When the matter came before us before, we adjourned this reference in order to allow the petitioner to go before the Income-tax Commissioner, Burma, and get the registration of this firm cancelled or set aside. Accordingly, the Income-tax Commissioner, Burma, acting under his powers under section 33 of the Income-tax Act heard both the petitioner and the other partner and as a result of that hearing came to the conclusion that there were no circumstances which would justify his cancellation of the registration of the firm. That being so, the firm still remains a registered firm. The petitioner, however, contends before us that notwithstanding that, he is entitled to go into the question of the validity of that registration and put before us all the arguments which he presumably addressed to the Income-tax Commissioner, Burma, and the Income-tax Commissioner here. We see a very great difficulty in his way. We have not got before us here one of the interested parties, namely, the other partner. He it was who presented the application through his agent for registration of the firm in Burma and he is thus a person very much interested and from what we understand about his attitude he is opposed to the view taken by the petitioner here. He stands for the registration of the firm. Obviously we cannot here decide such an important question as this in his absence and there is no provision for his being made a party to this reference. Clearly, the proper remedy lying to the hand of the petitioner is for him to file a suit in Burma for a declaration that for the reasons he has given, the registration of the firm is invalid. We must take things as they are and as they are, this is a registered firm and we are therefore bound to answer the question referred to us in the affirmative. Rs. 200 costs to the Commissioner of Income-tax.

(451) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice and Mr. Justice Dhalve.

(19th May 1931.)

Gobardhan Das .. *Assessee.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Referring Officer.*

Income-tax Act (XI of 1922) Sec. 13—Money-lending business—Loans on mortgages—Decree on mortgage and sale in execution—Assessment on accrued interest and decree amount satisfied—Assessee not regularly employing mercantile system—Basis of assessment.

In execution of a decree for over Rs. 30,000 obtained on a mortgage for Rs. 600 effected on 10th October 1915, the secured properties were sold for Rs. 19,100 in July 1926 and the sale confirmed on 11th April 1927. On an assessment for 1928-1929 of Rs. 18,500 as income of the previous Diwali year, November 1926-November 1927, the assessee contended that his method of accounting being the mercantile system, assessment on cash basis was not legal. It was found that in the previous years his account books did not contain the accounts of all his debtors, the accrued interest though entered in the debtor's personal account not entered in the interest account and that the mortgage loan in question never found a place in the accounts.

HELD, that the assessee could not be said to have regularly employed the mercantile system within the meaning of Sec. 13 of the Income-tax Act and that the decree amount in part satisfied by the sale was properly assessed as the income of the Diwali year 1926-27.

Where in a suit instituted in 1928 by one N. & S. in whose favour a mortgage bond was executed in 1922 for Rs. 47,000 which included Rs. 35,000 as the prior dues of the debtor, the Court found that N. & S. were benamidars of the assessee and on an assessment in 1928-29 on a sum of Rs. 5640 as accrued interest on this loan, the assessee put in an affidavit disclaiming any interest in the said loan and contended that the assessment on accrued basis should not have been made,

HELD, that on the facts the Income-tax authorities were not wrong in refusing to accept the affidavit and including the accrued interest as assessable income.

Case [Miscellaneous Judicial Case No. 59 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Behar and Orissa, for the opinion of the High Court.

CASE.

Babu Gobardhan Das, of the firm Ganesh Gobardhan Das, hereinafter termed "the assessee" has been assessed by the Income-tax Officer, Hazaribagh, for the year of assessment 1928-29 as the head of a Hindu un-

divided family which carries on business of various kinds, including money-lending, at Pachmaba in the district of Hazaribagh and in Calcutta. Two questions of law arise out of the assessment of the profits of the money-lending business at Pachmaba, which are referred to the Honourable Court under section 66 (2) at the instance of the assessee.

2. The facts in regard to the first question are as follows:—

On the 10th October, 1915, the assessee lent Rs. 600 to the Tikait of Chakmanju, on mortgage of certain properties. Nothing having been paid either by way of principal or interest, in February, 1922, the assessee filed a suit in the Court of the Sub-Judge, Hazaribagh, for recovery of Rs. 22,000, being principal and interest. On the 10th November, 1922, the Sub-Judge decreed the claim with costs and interest at 6 per cent. per annum from the date of the decree to the date of realisation. An appeal filed before the Hon'ble High Court at Patna was dismissed on the 22nd January, 1925. The decretal amount accumulated to Rs. 30,327. On the 3rd July, 1926, the mortgaged properties were sold in execution for Rs. 19,100 and the sale was confirmed on the 11th April, 1927. This latter date fell within the previous year, viz., the Dewali year 1983-84, (November 1926 to November 1927). The Income-tax Officer, deducting Rs. 600 principal assessed the balance, Rs. 18,500, as income of the previous year, and, in appeal, the Assistant Commissioner upheld his decision. The contention of the learned advocate for the assessee before me was that as the accounts were kept on the mercantile basis, nothing more was assessable as income of the previous year than the interest on the decretal amount of Rs. 22,000 at 6 per cent per annum for 12 months, viz., Rs. 1,320.

Now the assessee professes to keep his accounts according to the mercantile system, but the records of past years reveal that the books produced before the Income-tax Officer have never contained account of all his debtors, and that often, while entering accrued interest in the personal accounts of debtors, he failed to enter the same in the interest account. Moreover, this particular loan to the Tikait of Chakmanju found place in the accounts produced before the Income-tax Officer, neither in the previous year nor in any former year, and the assessee had never previously been assessed on the interest of the loan.

3. The facts in regard to the second question are as follows:—

The assessee has been assessed on a sum of Rs. 5,640 being accrued interest on a loan of Rs. 47,000 advanced to the Raja of Palganj. The assessee denies altogether any interest or concern in the said loan, which he avers was advanced to the Raja by his relations Nathmull and Srinivas. The following facts are established:

On the 3rd September, 1922, a bond was executed by the Raja of Palgunj in favour of Nathmull and Srinivas. The bond purported to give rehan or mortgage of certain rents payable by certain tenants of the Raja in consideration of the sum of Rs. 47,000 of which Rs. 35,000 was represented to be the previous dues of Babu Gobardhan Das, the assessee, from the Raja, and the balance an amount paid in cash to the Raja. The facts in regard to the said dues of Rs. 35,000 have never been revealed by the assessee and he has never been previously assessed thereon or on any portion thereof. After execution of the bond Nathmull and Srinivas applied to have their names registered as rehandars with respect to the lands occupied by the tenants in question. The Land Registration Officer held that

the transaction was not a mortgage but an assignment of rent in lieu of interest; further that Nathmull and Srinivas, being Calcutta merchants with no local interest or business, were plainly the benamidars of the assessee, who had utilised their names owing to a doubt as to the recoverability of the said Rs. 35,000 arising from the circumstance that the original advance had been made to the Raja during the management of the Raja's estate by the Encumbered Estates Department. On the above findings registration was refused. In 1928, Nathmull and Srinivas brought a suit on the document in the Court of the Additional Sub-Judge of Hazaribagh, for recovery of Rs. 64,414 principal and interest. The Sub-Judge also held that Nathmull and Srinivas were the benamidars of the assessee. To substantiate his contention that he had no concern with the loan, the assessee has adduced no other evidence than an affidavit sworn by himself.

4. The assessee formulated the following questions for reference to the Honourable High Court.

(a) Whether the Income-tax Officer could change the method of accounting adopted in previous and present assessments and assess on actual receipt in one or more particular cases.

(b) Whether decretal amount realised by sale of properties in execution can be assessed as profits, especially when the system of accounting adopted under section 13 of the Income-tax Act was mercantile.

(c) What is date on which the above amount may be said to have been constructively received, the date of sale when receipt for the same was given by decree-holder or the date of confirmation of sale.

(d) Whether assessment could have been legally made in respect of debt standing in the name of a third person in spite of a sworn affidavit of the assessee and in the absence of any materials on the record to show that the assessee was the real creditor.

5. Questions (a), (b) and (d) beg the respective points at issue. Question (c) has already been decided by the Hon'ble High Court in the case *Raja Raghunandan Prosad Singh* v. *Commissioner of Income-tax, Bihar and Orissa.*[1] The questions fromed by the assessee are not therefore referred.

6. The questions which are referred are these:—

(a) Was Rs. 18,500 rightly included in the income of the previous year on account of interest on the Chakmanju loan?

(b) Was the accrued interest on the Palganj loan rightly included in the income of the previous year?

7. My opinion on question (a) is as follows:—Section 13 of the Act provides that if the method of accounting employed by any assessee is such that, in the opinion of the Income-tax Officer, the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. On the

(1) 4 I. T. C. 123.

facts given above, there can be no doubt that it has never been possible in any year correctly to deduce the income of the assessee from the accounts produced before the Income-tax Officers. In my opinion, therefore, the Income-tax Officer rightly assessed the profits of this particular loan on the basis of actual realisation in the previous year, and the answer to question (a) is in the affirmative.

8. In regard to question (b) my opinion is that whether Nathmull and Srinivas were the benamidars of the assessee in the aforesaid transaction is a question of fact, nor can there be any doubt on the facts given above that such was the case. This being so, and the system of accounting followed by the assessee being professedly the mercantile system, my opinion is that the answer to the question is in the affirmative.

K. K. Bannerji, for the Assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

DHAVLE, J.:—There are two questions which have been referred to this Court in this case. The first is "Was Rs. 18,500 rightly included in the income of the previous year on account of interest on the Chakmanju loan?" About the facts of the loan there is no dispute at all. On the 10th October 1915, the assessee lent Rs. 600 to the Tikait of Chakmanju, and on the 10th November, 1922 he obtained a decree for the recovery of Rs. 22,000, principal and interest, in that connection. There was an appeal to the High Court which was unsuccessful, and the decretal amount rose to the figure of Rs. 30,327. In July, 1926, the mortgaged property was sold in execution for Rs. 19,100, and the sale was confirmed on the 11th April, 1927, that is to say, within the year to be assessed. The Income-tax authorities deducted Rs. 600 from Rs. 19,100 for which the properties had been sold, and included the amount of Rs. 18,500 in the assessee's income. The complaint made by the assessee is that his accounts were kept on the mercantile system and that this item of Rs. 18,500 should not have been added to his income as it represents a figure arrived at not on the mercantile but on the cash system. The learned Advocate has contended that it was not open to the Income-tax authorities to mix up the two systems of account, the cash and the mercantile systems. The answer to this contention is that on the facts stated by the Income-tax Commissioner it is perfectly clear that the assessee in this case did not regularly employ the mercantile system according to which he professed to keep his accounts. The Income-tax Commissioner has pointed out three circumstances in this connection. The account books produced by the assessee before the Income-tax authorities in previous years never contained the accounts of all his debtors, and the assessee while entering the accrued interest in the personal account of debtors often failed to enter it in the interest account. Last but not least, this particular Chakmanju loan never found a place in the accounts produced by the assessee before the Income-tax Officer.

Under section 13 of the Indian Income-tax Act, to which the learned Advocate has referred, income is to be computed in accordance with the method of accounting "regularly employed" by the assessee, provided that if no method of accounting has been "regularly employed" or if the method employed is such that in the opinion of the Income-tax Officer the income

cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. In the present case it is quite clear that so far as the Chakmanju loan is concerned the assessee cannot be said to have "regularly employed" the mercantile system at all. It is true that the item that the Income-tax Officer included in the assessee's income on the present occasion is calculated not on the mercantile but on the cash system, but this is obviously justified by the fact that the loan has now merged in a decree which has been partly satisfied. The amount of the decree could hardly be dealt with on the mercantile system. It is in these circumstances impossible, in my opinion, to hold that the item of Rs. 18,500 was wrongly included in the income of the year in question.

The second question is "Was the accrued interest on the Palganj loan rightly included in the income of the previous year?" As regards this the facts stated by the Income-tax Commissioner are that in September, 1922, a bond was executed by the Raja of Palganj in favour of Nathmull and Srinivas for Rs. 47,000 out of which Rs. 35,000 was represented to be the previous dues of the assessee from the Raja. The facts in regard to the previous dues of Rs. 35,000 have never been revealed by the assessee, nor has he ever been assessed on that amount or any portion thereof. After the execution of the bond, Nathmull and Srinivas applied to the land registration authorities to register their names as rehanders, and those authorities came to the conclusion that Nathmull and Srinivas were merely benamidars of the assessee. In 1928 Nathmull and Srinivas brought a suit on the mortgage bond for recovery of Rs. 64,414, principal and interest, and the Subordinate Judge before whom the suit was tried also held that Nathmull and Srinivas were the assessee's benamidars. The assessee put in an affidavit before a Deputy Magistrate and Collector while the income-tax proceedings were going on before the Assistant Commissioner, declaring solemnly that he had no concern with Nathmull and Srinivas' dues on the basis of any registered deed of mortgage held by them against the Raja of Palganj. The Income-tax Commissioner refused to attach any weight to this affidavit, and it was clearly open him to do so in view of the finding of the land registration authorities and the Subordinate Judge. Now it is in respect of this loan to the Raja of Palganj (which openly includes Rs. 35,000 as the previous dues of the assessee) that the Income-tax Officer added Rs. 5,640 as accrued interest on the loan in the computation of the assessee's income for the year with which we are concerned.

The learned Advocate for the assessee has urged that as the assessee has not been able to realise anything in respect of the loan, and as in respect of the Chakmanju loan the Income-tax Officer adopted the cash basis, it is unfair to the assessee that the mercantile, "accrued" basis should be adopted in respect of the Palganj loan. The answer to this however is that the Chakmanju affair stands on a special footing. The loan has merged in a decree and the decree has been partly realized. In the case of the Palganj affair the assessee has still to take steps for the realisation of his loan, apart from the abortive attempt made by his benamidars Nathmull and Srinivas, and it has to be remembered that so far as the assessee has chosen to disclose his transactions to the Income-tax authorities, it is his own case that he proceeds on the mercantile system. In these circumstances it does not seem to me that the Income-tax authorities were wrong in including in the assessee's account for the year in question what has been called the accrued interest on the Palganj loan as distinguished of course from interest actually realized. I would therefore answer this question also against the assessee.

The reference which was made at the instance of the assessee therefore fails altogether. I would dismiss it and award the Income-tax Commissioner Rs. 200 as the costs of this hearing.

COURTNEY TERRELL, C.J.:—I agree.

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(452) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell, Kt., Chief Justice
and Mr. Justice Dhalve.

(20th May, 1931.)

Basant Lal Ramjidas . *Assessee.*

v.

The Commissioner of Income-tax,
Behar and Orissa .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 30, 61 and 66 (2)—Application for copy of appellate order—Stamp fee under Court Fees Act, Sch. II (1)—Pleader arguing appeal—Specific authority to get copy, necessity of—Invalid copy application, Deduction of time.

An application for copy of the order passed in appeal by the Assistant Commissioner of Income-tax is chargeable with a stamp of two annas under Sch. II (1) of the Court Fees Act.

A pleader duly authorised to conduct an appeal before the Assistant Commissioner of Income-tax but not expressly authorised in writing to obtain a copy of the Assistant Commissioner's decision cannot validly present an application for a copy of the order passed in the appeal, such an application amounting to "attendance before an Income-tax Officer" within the meaning of Sec. 61 of the Income-tax Act.

In computing the period of time for an application under Sec. 66 (2) of the Act no time can be deducted in respect of an invalid copy application before it was put in order.

Case [Miscellaneous Judicial Case No. 86 of 1929] stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Behar and Orissa, in compliance with the order of the High Court.

CASE.

The questions, which I have been ordered by the Hon'ble Court to refer, arise out of the assessment, by the Income-tax Officer, Bhagalpur, of the profits of the Oil Mill of Messrs. Basantlal Ramji Das hereinafter termed "the assessee", for the year of assessment 1928-29. The books of the assessees showed a loss of Rs. 16,325 on the working of the mill in the previous year in question, without taking into account depreciation. Obviously the

assessees should have been prepared to demonstrate the reasons why and the circumstances in which the mill had made such a large loss. Now, before the seed is crushed in the mill, it is sifted by a screening machine. The assessees denied maintaining any account of the quantity of seed rejected in screening. It is usual to maintain such an account and obviously necessary to do so, if outturn is to be checked. The Income-tax Officer, therefore, according to his experience of other mills, calculated the waste in screening at 3 per cent of the total quantity of seed put through the screening machine. Allowing this percentage he found that the outturn of oil from the mill was 29 per cent only of the seed crushed. This was much below the standard of output in other mills, while, in the years covered by the assessments of 1926-27 and 1927-28, the percentage obtained by the assessees themselves was 31½ per cent and 30 per cent respectively. The Income-tax Officer, therefore called upon the assessees by formal notice under section 23 (3) to demonstrate the reasons why the output of oil in the previous year was less than in past years and in other mills. Obviously the assessees should have been ready with their explanation there and then. No appearance was put in on the date fixed, viz., the 5th October, but, on the next day, a pleader applied for adjournment on behalf of the assessees. The prayer was allowed and the case was adjourned to the 15th November on which date the learned pleader appeared and supplied a statement of the proportion of the different kinds of oil seed ground in the mill. As the proportion of past years was not supplied, the Income-tax Officer held that there was no material before him to show that the proportion of the different kinds of seed used affected the output, and that the assessees had failed to establish that the percentage of outturn shown in the books was correct, and he made assessment by applying the percentage obtained in 1926-27, namely 31.6 per cent.

2. The assessees appealed to the Assistant Commissioner. The Assistant Commissioner held that it was extremely probable that the assessees kept a record of outturn, whether daily, weekly or fortnightly and that they also kept an account of the process of screening, that, in view of the absence or suppression of these subsidiary accounts, the assessees had failed to provide the necessary materials for checking their books, and that, in the circumstances, the Income-tax Officer was justified in refusing to accept the percentage of outturn according to the books. He therefore dismissed the appeal.

3. The assessees thereupon filed a petition before me under sections 33 and 66 (2). They formulated no question of law for reference to the Hon'ble High Court under the latter section. It was merely stated in the petition that the prescribed fee was sent "in case the mistake in the records was not accepted." At the hearing before me they explained that by the mistake in the records they meant that the Income-tax Officer had wrongly calculated the outturn of 1926-27 to be 31½ per cent and that the outturn in that year was in fact 30 per cent. They gave me to understand that they would be satisfied with relief under section 33 accordingly. Thus the application under section 66 (2) was merely a method of bargaining. I rejected the application under section 66 (2) firstly, because it was time barred and secondly for the reason that no question of law was formulated for reference to the Hon'ble High Court. Section 66 (2) authorises an assessee to require the Commissioner to refer any question of law arising out of the appellate order. If no question is formulated, no reference can be claimed according to the terms of the section. Here I may be permitted to state that I consider it improper for an application under section 66 (2) to be filed merely as a

means of bargaining for relief under section 33. This procedure is becoming increasingly common. I dealt with the application under section 33. The assessees' submissions were vague and unsatisfactory. In particular, they failed to demonstrate that the percentage obtained in 1926-27 was 30 per cent only. I therefore refused to interefere under section 33.

4. The assessees thereafter applied to the Hon'ble Court under section 66 (3), and the Hon'ble Court ordered me to refer the following questions:—

(a) Can an Income-tax Officer take any imaginary standard for calculating profits without disbelieving the account books?

(b) Can an Income-tax Officer tax an assessee on a standard of the output in other mills, or on a standard of profit which the assessee should have made?

(c) Is the application before the Commissioner barred? If not, is not the Commissioner to be called upon to consider the points of law raised in the petition?

5. Question (c) is taken up first. The facts in regard to this question are as follows:—

An application under section 66 (2) is due to be filed within one month of the passing of the appellate order. The appellate order in this case was passed on the 31st March 1929. The application under section 66 (2) received on the 16th May 1929 was sixteen days out of time. Unless, therefore, the assessees can show that sixteen days were consumed in obtaining a copy of the appellate order the application stands time barred. The facts in regard to the time taken for obtaining copy are these. The departmental rules require that an application for copy should bear a court-fee stamp of two annas and should be supported by a letter of authority from the assessee if made on his behalf by a pleader or other representative. On the 15th April an unstamped application for copy of the appellate order in this case was received from a pleader who filed no vakalatnama or letter of authority. The rules of the department forbid acceptance of applications which are not in the proper form. The applicant was therefore instructed by post card to file a court fee stamp of two annas as well as a letter of authority. He did so on the 21st April and on that date his application was found in order. The copy was ready on the 3rd May and according to rule as no arrangements had been made for taking delivery, the copy was despatched by post that same day to the address of the applicant and received by him presumably, in default of evidence to the contrary on the 4th May.

On the above facts the assessees are in my opinion entitled to claim the period from the 21st April the date of effective application to the 4th May only being thirteen days as the time consumed in obtaining copy. The original defective application cannot be allowed to count. Otherwise assessees will be at liberty to extend the period of limitation at will by calculated defective application. Assessees are expected to know the rules for obtaining copies which are published outside each office. In particular, a pleader, such as the assessees' agent must be expected to know them and whether he did so or not, should surely have realised that the copy of a confidential document, the unauthorised divulgation of which is punishable under the Indian Penal Code could not be handed over to him without vakalathnama or letter of authority. If the contrary is held then the department will be compelled

to ignore applications for copy which are not in proper form. If my view is correct, then the assessees have failed to prove that 16 days were consumed in obtaining the copy and the answer to the first part of question (3) is in the affirmative.

6. In regard to questions (a) and (b) my opinion is as follows:—

It is now apparent from the facts stated above that the Income-tax Officer did not take an imaginary standard for calculating profits, nor can it be said that he did not disbelieve the account books; nor again did he tax the assessees on the standard of output in other mills, or on a standard of profit which they should have made. The facts are that the outturn in the previous year, according to the books, was less than the outturn in past years, and less than the standard ordinarily obtained. Failure to maintain or suppression of the usual subsidiary accounts of periodical outturn and of screenage made the accounts impossible of check. The Income-tax Officer therefore called upon the assessees to demonstrate the reason for the defective outturn. The assessees, after ample opportunity allowed them, made no serious attempt to show why the outturn was less than in past years, although it cannot be believed that, as business men, they were not able to do so. It is impossible to believe that they do not carefully watch the outturn, especially in a year in which, as they claim, they made a large loss. They put forward in explanation that more linseed had been used, but failed to show that less linseed had been used in the past, nor did they attempt to demonstrate that linseed produced less oil than other varieties of seed or even attempt to do so. The failure of the assessees to attempt proof of the correctness of the figures of outturn shown in their books raises a presumption against the correctness of those figures. In my view, therefore, the Income-tax Officer acted reasonably in the circumstances in requiring proof of the correctness of the figure of outturn, and the assessees having failed to attempt to adduce necessary proof, he acted reasonably to make estimate of profits, and the basis adopted by him viz., the outturn of a former year, was reasonable basis. In my opinion the question should be answered accordingly.

7. It appears to me, however, that, as assessees are expected to be able to demonstrate the accuracy of their account books, the real question of law which arises out of the facts is this.—"Was there evidence before the Income-tax Officer upon which he should have held that the outturn according to the books was correct"?

In my opinion for the reasons given above the answer to this question is in the negative.

K. P. Jayaswal and *A. K. Mitra*, for the Assessee.

C. M. Agarwala, for the Crown

JUDGMENT.

COURTNEY TERRELL C. J.:—The first and preliminary point which has to be decided in this case is one of limitation and it has been stated by the Commissioner for the opinion of the Court. The question is whether the application which was made under section 66 (2) of the Indian Income-tax Act by the assessee was in time reckoning the period of one month from the date of the passing of the appellate order made by the Assistant Commissioner. The appellate order was passed on the 31st March 1929. The first

application purporting to be under section 66 (2) was received in the Office of the Commissioner on the 16th May 1929, that is to say it was, if that date was to be taken as the correct date, 16 days out of time. The applicant purports on this basis to say that the 16 days was consumed in obtaining a copy of the appellate order.

On the 15th April the pleader who had argued the case before the Assistant Commissioner sent a letter to the office of the Assistant Commissioner accompanied by a one anna stamp asking for a copy of the Assistant Commissioner's appellate order. He further asked to be informed of the estimate of cost for the certified copy and said that on receipt of that notification he would deposit the sum in the local treasury. Furthermore his application was not accompanied by a vakalatnama from the assessee expressly authorising him to obtain a copy of the Assistant Commissioner's decision. The applicant was asked by postcard to file a court fee stamp of two annas as well as an express authorisation to enable the pleader to obtain the copy. On the 21st April he did in fact file the authorization and the court fee stamp of two annas and his application was then found to be in order and the copy was made ready on the 3rd May and was despatched by post to the address of the applicant and received by him, it must be presumed, on the 4th May. Such are the facts as found by the Commissioner.

The Department say that the application of the 15th April was not an application at all. It suffered from two defects which prevented it from being considered as such, the first defect being that it did not bear a stamp of two annas but one of one anna only, the second being that it did not contain an express authorisation in writing signed by the assessee himself. In answer to this objection by the Department the assessee contends that the fee of two annas cannot legally be exacted. If we turn to the second schedule of the Court Fees Act we see set forth detailed provisions as to certain documents in the nature of applications or petitions which must bear the stamp fee prescribed by the particular Local Government, the matter of the precise stamp fee being within their purview as independent finance authorities. Now the scale of so-called fixed fees set forth in this schedule is divided up into classes respectively marked (a) and (b). Taking the documents referred to in group (a) first, the first paragraph refers to applications or petitions which are made by any persons having dealings with the Government and relating to the subject matter of these dealings when such application is presented to any officer of the Customs or Excise department or to any Magistrate, and a fee of two annas is leviable upon such applications. The second paragraph refers to applications or petitions by persons holding temporarily settled land under direct engagement with the Government and relating to such subject matter. The third paragraph refers to applications which relate to conservancy or improvements of a municipal character. The fourth paragraph refers to applications to Civil Courts and Small Cause Courts and to Collectors of revenue in cases where the amount of the value of the subject matter is less than fifty rupees. The fifth paragraph which is the one with which we are particularly concerned refers to applications for obtaining copies or translations of judgments, decrees or orders which have been passed by Courts, Boards or Officers and in respect of those applications also a fee of two annas is required. That particular paragraph opens with the words "or when presented to any Civil, Criminal or Revenue Court or to any Board or Executive Officer" and it is argued by Mr. Jayaswal on behalf of the assessee that in this matter the Assistant Commissioner cannot come under the head of Revenue Court and he is not according to his argument an executive officer and therefore that judgments,

decrees or orders which are passed by him do not come within the purview of this paragraph. In my opinion that is giving in the first place undue weight to the first words of the paragraph which are not the most material words. The most material words of the paragraph are the words "judgments, decrees or orders passed by such Court, Board or Officer" and they are intended to cover every case of every kind in which a judgment, decree or order has been passed by any Court, Board or Officer capable of passing such judgment, decree or order and having regard to what I think is the proper meaning of the words it certainly covers an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income-tax Act.

The second defect in the notice of the 15th April was that it was not properly authorised by a vakalatnama. The justification for the demand of such express authorisation is to be found in two matters in the Income-tax Act. In the first place there is section 61 which states as follows:–

"Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceedings under this Act, may attend either in person or by any person authorised by him in writing in this behalf."

The next point to be considered in the Income-tax Act is that the proceedings are of a most secret character and heavy penalties are imposed upon any officer who makes disclosures of matters which under the Act are confidential and nothing can be considered more confidential than the actual assessment which is made. Now it does not follow that because an agent is duly authorised to conduct the business of the appeal before the Assistant Commissioner that he is *ipso facto* authorised to obtain copies of the Assistant Commissioner's judgment or indeed to perform any act preparatory or incident to the conduct of an appeal. It is, as the learned Government Advocate points out, quite conceivable that whatever the merits of the gentleman who was employed in conducting the appeal before the Assistant Commissioner that his services may be dispensed with after the matter had passed the Assistant Commissioner's hands and it is quite conceivable that circumstances might arise in which it was considered by the assessee highly undesirable that he should receive copies of the decision which had actually been given. In these circumstances it was reasonable and proper for the Department to require that any person asking for a copy of the judgment should be expressly authorised in writing in that behalf and the application for a copy of the judgment is properly within the meaning of section 61, "attendance before an Income-tax Officer" in connection with proceedings under the Act. In as much as the application dated the 15th April cannot be considered to be a valid application and in as much as the authorities are not bound to take any notice of an application which is not in order the time which the assessee was entitled to deduct would only run from the 21st April when he in fact put his application in order forwarding the proper stamp and the letter of authorisation and in these circumstances the time which he is allowed to deduct falls short by one day of the allowance which would bring him within the period of one month. In these circumstances the application before the Commissioner for the statement of the case was barred and we are not competent to go into the other matters which were raised by the Commissioner on the hypothesis that his view as to limitation might be unsound. I would therefore answer the question of the Commissioner as to whether the application before him was barred in the

affirmative and would decline to go into the other points raised in the statement of the case. The application to state a case was made at the instance of the assessee who fails and he must pay Rs. 200 by way of costs.

DHAVLE J.:—I agree.

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(453) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice
and Mr. Justice Dhalve.

(20th May, 1931.)

Raghu Karson .. *Assessee.*

v.

The Commissioner of Income-tax,
Bihar and Orissa .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 22 (4) and 23 (4)—Assessment for non-production of accounts—Assessee's denial of accounts not accepted by Income-Tax Officer—Finding when binding—Business controlled and managed by individual—Allegation of partnership—Onus of proof.

Where the Income-tax Officer on taking evidence as to the nature and conduct of the business came to the conclusion that the assessee had in fact books of account and on non-compliance of the notice calling for accounts under Sec. 22 (4) of the Income-tax Act made an assessment under Sec. 23 (4).

HELD, that there being evidence for the conclusion of the Income-tax Officer the Court could not go behind the finding of fact, provided it was not obviously perverse.

Where it was claimed that an assessee was carrying on a business in partnership, the partners being members of his family entitled to and paid a share in the profits and the Income-tax Officer not satisfied with the evidence called in support of the contention found the business to be assessee's individual one,

HELD, that the assessee having failed to discharge the onus of establishing that the business managed and controlled by him was a partnership, he was rightly assessed as an individual on the profits of the business.

Case [Miscellaneous Judicial Case No. 4 of 1930.] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Raghu Karson, hereinafter referred to as "the assessee," is a contractor under the Bengal-Nagpur Railway, assessed by the Income-tax Officer, Cuttack. His contracts are chiefly of earthwork. In past years he

was always assessed to income-tax as an individual assessee. On April 2, 1928, a petition dated April 1, was received from him by the Income-tax Officer, Cuttack, in the following terms, which are reproduced exactly:— The petitioner had been paying income-tax on the profits of his railway contract business as an individual, but had, in fact, been working on a partnership basis with his brothers and other persons; he has now had partnership deeds executed and registered; the partnership (sic) consisted of (1) the petitioner, Raghu Karson, (2) Kuarji Karson, (3) Damji Karson, (4) Walji Karson, (5) Bhagabanji Karson, minor, represented by his elder brother, Raghu Karson; he had also, besides his brothers mentioned above, partnership with (1) Visram Ladha, (2) Dana Panchan, (3) Jethlal Madhoji and Bhimji Jagmull, and (4) Shyam Sunder Sen; The profits of the said business (sic) were distributed among all the partners mentioned above in accordance with the shares mentioned in the registered deeds. The prayer was that notice under section 22 (2) be served on each of the above partners, including the brothers. The Income-tax Officer noted that, under the Act, any one of the partners of a firm could be called upon to file return on behalf of the firm, and issued, in connection with the assessment for the year of assessment 1928-29, a notice under section 22 (2) on Raghu Karson to make return of his income of the previous year. A return was thereupon made by Raghu Karson in which he described himself as a railway contractor simply. He showed his net assessable income as Rs. 14,942-10-0. The return gave no other details. With the return he filed a petition dated June 15, 1928, to the following effect:—His railway contract business had previously been carried on in partnership with other persons on unstamped agreements, which had now been embodied in properly executed agreements, which were being filed; his prayer was that the firms (sic) might be registered under section 2 (14) of the Income-tax Act. The petition contained a schedule showing the various sections of the railway, in which he purported to have partners, the shares of the partners, and also a computation of his own income from the railway contract business. The schedule is reproduced below:—

Section	Receipt.	Profit @ 10%	Partners.		Share of Profit.
Talchar	Rs. 21,436	Rs. 2,153	Raghu Karson	9 as.	Rs. 1,211
Berhampur	Rs. 58,831	Rs. 5,883	Nil		Rs. 5,883
Vizianagram	Rs. 47,142	Rs. 4,714	Raghu Karson	9½ as.	
Kharagpur (Balasore Sec.)	Rs. 1,41,026	Rs. 14,112	Jethmull	5 as.	
			Bhimji	1½ as.	Rs. 8,373
	Rs. 2,68,435		Raghu Karson	5½ as.	
			Dana Panchan	10½ as.	Rs. 1,620
					Rs. 17,087
			Deduct establishment charges taken on profit		Rs. 500
					Rs. 16,587
			Deduct Insurance Premium paid		Rs. 1,644 6
			Net assessable income		Rs. 14,942 10

In the schedule Jethmull is obviously the same person as the person called Jethlal Madhoji in the petition dated on April 1. The name of Shyam Sunder Sen referred to as a partner in the petition dated April 1 is not

found. It may be noted here that the Income-tax Officer accepted the contention that the partnership with this Mr. Sen, which was in respect of contracts received from the Public Works Department and not from the railway, was a separate firm, and that partnership has been separately assessed as an unregistered firm.

The above referred to partnership deeds which were filed were all similar to one another. Each partner agrees to work as a sub-contractor under Raghu Karson in a specified section of the railway on a specified share of the profits of that section only. He is to share losses. It is also provided that, out of the money advanced by Raghu Karson for the purpose of the business, the partner will be at liberty to spend an amount for his maintenance and personal expenses. No deed was executed by Raghu Karson himself, and he did not bind himself at all. Subsequently, it was discovered that a mistake had been made in the return, and a revised return was submitted showing the net income as Rs. 18,903. In the margin of the revised return was written as follows:—"Total receipts from the Railway Rs. 3,28,273. Raghu Karson's share in different firms (sic) as shown in the petition filed (namely the petition filed on June 15, 1928 above referred to) Rs. 20,447, at 10 per cent. profit after deducting establishment charge of Rs. 500 comes to Rs. 19,947, premiums deducted Rs. 1,644; net assessable income Rs. 18,303." It will be noted that the petition and the revised return speak of different firms, whereas the first petition spoke of one partnership and one business. Registration under section 2 (14) is applicable to one firm instituted under one instrument of partnership, but here there are three separate instruments.

2. The Income-tax Officer issued notice upon the assessee under section 23 (2) to produce the evidence he relied on in support of his return, and, at the same time, a notice under section 22 (4) to produce complete accounts of all business transacted at all places of business. He also issued a separate notice requiring the assessee to substantiate his application for registration, and to prove the genuineness of the firm to be registered. In the same notice the assessee was further required to show cause why assessment should not be made upon a Hindu undivided family in respect of the income, profits and gains accruing to him and to the other members of his family from all sources. The further sources of income, which were referred to in this notice, were profits of an Ice Factory and profits of a railway contract business carried on by the assessee in the name of his father, Karson Bhimji. It may here be noted that the rule to show cause against assessment as a Hindu undivided family was discharged by the Income-tax Officer, so that this point is not in issue.

In response, appearance was put in on behalf of the assessee, and it was represented on his behalf that no accounts of the business were maintained. In regard to the requirement to prove the genuineness of the firm to be registered, by a petition dated the 12th December 1928, it was submitted that, under the provisions of the Income-tax Act, it was mandatory upon the Income-tax Officer to register a partnership deed as soon as presented for registration under section 2 (14) of the Income-tax Act. No explanation was, however, put forward to show how three partnership deeds could be registered as one. In a subsequent petition dated January 15, 1929, the assessee offered his so-called partners as witnesses. The Income-tax Officer took the evidence of two of the partners. The partner, Jethlal Madhoji, deposed as follows:—He did not keep any account, but only chits; the profit was ascertained as soon as the work was finished; he met all his private expenses out of his own money, and used the money obtained from

Raghu Karson for business purposes; in the work of the Balasore section breach Raghu Karson made the payments himself; an Engineer had been appointed for all the sections; he did not remember how much had been deducted from the profits towards the pay of the Engineer.

Visram Ladha, partner, gave evidence to a like effect. He also said that all purchases of materials were made in Raghu Karson's name, and Raghu Karson dealt with all communications from the Railway. It is admitted that none of the so-called partners have put any capital into the business.

Raghu Karson himself deposed that his father, Karson Bhimji, did contract work under the Bengal-Nagpur Railway in the Cuttack section, which work was managed by him (Raghu Karson) by a general power-of-attorney on behalf of his father. As regards his own railway contract business, he first said that all profits were paid out in cash to the partners at the close of each year, but corrected himself by saying that the profit was ascertained as soon as each particular piece of work was completed, and cash was paid out to the partners when the cheque in payment had been received from the railway. Money was supplied by him to each partner some three or four times for a work of two months' duration; there was no account of such money paid, but only kutcha chits, which were destroyed when the account had been settled. One or two Muharrirs were employed in each section, who were employed and dismissed by the partners and paid by the partners. An Engineer had been engaged on a monthly salary of Rs. 200 to supervise work on all sections. The partners met their private expenses out of the money advanced to them and kept a rough account of of money drawn from him and of the amount spent for private purposes and on behalf of the work, but mostly the work was done on faith. In correction of this he later stated that all the partners met their private expenses out of their private money. He could not say whether there had been a profit or loss in the work in the breach in Balasore, the accounts of which had not been finally settled. But he still retained in his memory the amounts drawn by the partners and the amounts spent on other heads in respect of this work. His father had cash to the amount of Rs. 25,000 to Rs. 30,000 in his safe at Cuttack over which money he had control. The Railway paid by cheques, which were cashed by him, and the money kept in his father's safe.

After considering the above evidence, the Income-tax Officer came to the conclusion that it was impossible to believe that accounts were not kept, and, for this reason, made the assessment under section 23 (4). He also refused registration on the ground that the application was not in the prescribed form, and the partners not real partners. He, therefore, assessed Raghu Karson as an individual. To the profit estimated as accruing from the Railway contract work, the Income-tax Officer added an estimate of Rs. 10,000 as income from money lending, share in the Acme theatre, and partnerships in other Railway contracts.

Application under section 27 was rejected, whereupon appeal was preferred to the Assistant Commissioner, who upheld the refusal of the Income-tax Officer to reopen the assessment. In the written petition of appeal it was clearly stated that the firms in the separate sections were liable to be separately assessed, but still refusal of registration of all the firms in one partnership, and on the basis of three instruments was objected to. The assessee, thereafter, made a combined application under sections 33 and 66 (2).

3. When I heard the learned Advocate for the assessee in connection with this application, he urged that the partners were real partners, and, even if they were not so, their share of profits should have been allowed as a business expense. This argument is also set down in the written application under section 66 (2). I pointed out to the learned Advocate that this contention involved that there was one business only and one firm only, which was also the implication of the application for registration, but that it could hardly be the claim of the assessee that the various firms were all partners in one business, since the share of the so-called firms in the one firm were nowhere specified, and there was no such instrument of partnership of any such firm. I also pointed out that, in the revised return submitted by the assessee and in various petitions (above referred to), different firms and different businesses were spoken of, not one firm and one business, and that it was impossible to tell which of these two alternatives was being put forward as the real contention of the assessee. The learned Advocate admitted the contradiction, and chose the latter alternative, saying that the assessee claimed to be assessed on his 16 annas share in the Berhampur Section, and that the three other sections should be separately assessed as separate and different firms. He admitted that the question of registration did not, therefore, arise, and that the application for registration was "in anticipation," as he phrased it and "merely for the instruction of the Income-tax Officer." He admitted that the language of the various petitions in this respect was loose. It will, however, be seen from the account given above that the application for registration was insisted on at all stages as the main plank of the assessee's case.

4. Four questions of law were proposed by the assessee for reference to the Honourable High Court. Of these two had reference to the inclusion in total income of the assessee's share in the profits of the Acme theatre and of income from money-lending. Under section 33 I have allowed the claim of the assessee to remission on these heads, and do not refer these questions. The remaining two questions are referred. These are:—

(a) Whether an assessment can legally be made under section 23 (4) for non-compliance with notice under section 22 (4) for production of books of account when the assessee denied existence of the books of account and proved from the nature of his business that books of account were not required for his business.

(b) Whether an agreement of partnership registered under the Registration Act for sharing profit and loss in business in a defined manner can in law be regarded as no evidence of partnership merely because under the agreement one partner is to subscribe the capital and the others their labour and skill and in matters of management the capitalist partner is to have a right superior to other partners?

5. My opinion on question (a) is as follows:—

The question rests on a mis-statement of facts, namely, that the assessee has proved that books of accounts are not required for the business. This point is in issue and cannot be assumed. The question is therefore amended as follows:—Was the assessment rightly made under section 23 (4)? My opinion is as follows:—The assessee claims that the contracts undertaken are mostly earthwork contracts, the measurements of which are

made by the Railway Engineer, so that there is no need to keep accounts. The facts are as follows:—The assessee does contract work for the railway in four sections. In the one section, according to his own statement, he is sole proprietor, and, in the other three sections, he had partners with varying shares. Contracts involving total receipt from the Railway of over 3 lakhs were carried out in the previous year. These contracts were many in number. Out of the monies advanced by the assessee to the partners, the partners, according to the terms of their agreements, take a certain amount for their own private expenses. The partners themselves deposed that they paid their expenses out of their own pockets, and the assessee himself in his evidence first said one thing and then the other. There are Muharrirs, one or two in each section, but they write no accounts. The partners themselves are silent about these Muharrirs, although the assessee says that they are appointed and paid by them and the partners say that they themselves keep no accounts. In the Balasore breach work the assessee spoke of amounts drawn by the partners, but Jethlal Madhoji, partner, said that the assessee had made those payments himself. There is an Engineer who supervises work in all the sections, but the partners do not know how much of his pay is contributed by each section. Three or four payments are made by way of advances by the assessee to the partner concerned in respect of a work of two months' duration. The amounts are kept in the memory of the assessee only, and, at the completion of each contract, accounts are settled by word of mouth and the profit or loss ascertained under each contract paid to partner. When cheques are cashed, the money is kept by the assessee in his father's safe, which also contains cash of Rs. 25,000 to Rs. 30,000 belonging to his father, which he controls on behalf of his father. The assessee also manages his father's contract business with the Railway at Cuttack, whether with or without accounts is not in the record. In all these circumstances the inevitable conclusion is that it is impossible for the assessee to be equal to such an intricate task and to carry these complications of figures in his mind for such long periods. There can be no doubt whatever that the Muharrirs, who are admitted to be employed, write up accounts which the assessee has refused to produce. The Assistant Commissioner visited the Cuttack Office and found a staff of clerks working. It is improbable that these are retained only for the contract business which he manages on behalf of his father, or for other activities. The contradictions and inconsistencies between the assessee's account of the business done and that of the partners examined prove that neither the evidence of the assessee nor that of his partners can be relied on. In my opinion, therefore, the answer to the question as amended is in the affirmative.

6. My opinion on question (b) is as follows:—The said agreements were not regarded as no evidence of partnership merely because the so-called partners had subscribed no capital. I do not therefore refer the question as stated. The question which arises is this:—"Was the assessee rightly assessed as an individual on the profits from the Railway contracts in all the four sections?" This question is therefore referred. My opinion is as follows:—The assessee did not, until the hearing of the application under section 66 (2), and until the contradiction was pointed out to him, make up his mind whether the so-called partners were each of them partners with him in a separate firm, or were all joint partners in one firm. At one time the one account was put forward, at another time the other. This inconsistency demonstrates that the whole account of the partnership is made up and bogus. The further inconsistencies, pointed out above in dealing with question (a), between the evidence of the partners and the evidence of the assessee himself, and again between both and either and the registered deeds,

are eloquent to the same effect. The so-called deeds of partnership themselves plainly set out that all the partners are sub-contractors merely, and work at the direction of the assessee. The assessee has bound himself by no agreement as regards his so-called partners or any of them. The account of the method, according to which business is done besides being inconsistent, is obviously preposterous and manufactured. The assessee finally decided that his contention was that there were so many separate firms, but these so-called firms have no single attribute of a firm or of a separate entity. They have not even a separate address. The Railway has never heard of their existence, nor the partners themselves, or they would have made this plain in their evidence. The fact that one Engineer supervises all the sections is plain proof that all is one business. Had the firms been really separate, the assessee could not have lumped them all together in one application for registration, nor would the so-called partners have submitted to this. His paramountcy is apparent in his registration application. In my opinion, therefore, the answer to the question as amended is in the affirmative.

K. P. Jayaswal, G. P. Das and *H. K. Bose*, for the Assessee.

C. M. Agarwalla, for the Crown.

JUDGMENT.

COURTNEY TERRELL, C.J.:—The first question raised in the case submitted to us is whether the assessee was rightly assessed under section 23 (4) of the Income-tax Act. The assessee is a contractor who does work for the Railways. He received a notice under section 22 (4) to produce his books of account. He denied that he had any books of account and the Income-tax Officer took evidence to guide him in coming to a conclusion whether the contention of the assessee that he had no books of account was or was not justified, and upon considering the evidence as to the nature of the business carried on by the assessee and the manner in which it was conducted he came to the conclusion that the assessee had in fact books of account which he was refusing to produce. It is unnecessary to go in detail through the evidence produced before the Income-tax Officer. He has summarised it very clearly and it is clear that it was open to him to decide that question of fact and there was evidence upon which he could arrive at the conclusion at which he did and it is not for us to go behind the finding of fact of the Income-tax Officer provided that it be not obviously perverse. On the finding of fact the Income-tax Officer was bound in accordance with his duty to assess the assessee under section 23 (4). Therefore the answer to the first question as to whether the assessment was rightly made under section 23 (4) should, in my opinion, be in the affirmative.

The second question was whether the assessee was rightly assessed as an individual on the profits made by the business of contracting which he carried on. The assessee attempted to set up that in fact he had several partners, members of his family, who were entitled to share in the profits of the business and that he in fact paid that share to them and he called evidence to support his contention but the evidence was of such a character and so entirely suspicious that, in my view, the Income-tax Officer was entirely justified in his finding of fact that the business was an individual one carried on by the assessee. Moreover, inasmuch as the business was in fact managed and controlled by him the onus lay entirely upon him to satisfy the Income-tax Officer that he had partners as he alleged and that

onus he failed to discharge. I find myself, on the summary of the evidence recorded by the Income-tax Officer, in agreement with him as to the conclusion of fact at which he arrived. Therefore, in my opinion, the answer to the question as to whether he was rightly assessed as an individual on the profits from Railway contracts should be in the affirmative.

The assessee fails on both points and he should pay the costs of the Income-tax Commissioner to the extent of Rs. 200.

DHAVLE, J.:—I agree.

(454) IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Courtney Terrell Kt., Chief Justice,
and Mr. Justice Dhavle.

(20th May, 1931.)

Sachindra Mohan Ghosh, Receiver,
Jharia Raj Estate .. *Assessee.*

v.

The Commissioner of Income-tax,
Bihar and Orissa .. *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 12—Estate managed by Receiver appointed by Court—Income from royalties and non-assessable source—Receiver's salary, if allowable expenditure.

Where a Receiver appointed by Court for the management of the Jharia Estate, on an assessment under Sec. 12 of the Income-tax Act of the income of the estate consisting of 6 lakhs mining royalties and Rs. 60,000 non-assessable agricultural income, claimed to deduct his salary as an allowable expenditure and the claim was disallowed on the ground that the appointment was made by reason of litigation in respect of the estate and not for the purpose of earning the income assessed and further that part of the Receiver's functions being attributable to earning non-taxable income, no part of the aggregate salary could be split off as allowable under Sec. 12 (2),

HELD, that part of the salary representing the Receiver's services in earning the taxable income was an allowable expenditure, Sec. 12 (2) not requiring the whole of the salary to be incurred for earning the income assessed thereunder.

Case [Miscellaneous Judicial Case No. 39 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

In consequence of litigation between the proprietors of the Jharia Raj Estate and the widows of the late proprietor, a Receiver was appointed to the charge of the estate by the Honourable High Court of Calcutta under the provisions of the Code of Civil Procedure. The estate has been assessed to income-tax for the year of assessment 1929-30 in the hands of the Receiver. The assessment was made on "The Receiver, Jharia Raj Estate, Proprietor Sri Shiva Prasad Sinha, (Proprietor)." The assessable income is from royalty, rent of non-agricultural holdings, bazar rent and property. The estate also derives income from agricultural sources, which is not taxable. Before the Income-tax Officer the Receiver claimed, as expenditure deductible from assessed income, a portion of his salary proportionate to the allotment of his duties between the collection of the non-assessable and the assessable income. The income assessed is assessable under section 12 of the Indian Income-tax Act (XI of 1922) and the claim was made under sub-section (2) of that section. The Income-tax Officer allowed the claim to the extent of half the pay drawn by the Receiver, but, in appeal, the Assistant Commissioner reversed his decision and disallowed the whole salary. The assessee has required me to refer the question to the Honourable High Court under section 66 (2)

2. The question what proportion of the salary would be allowable is a question of fact and is not referred. The question which is referred is this:—"Is any portion of the salary of the Receiver allowable as expenditure under sub-section (2) of section 12?"

3. My opinion is that no part of the salary of the Receiver can be said, according to the terms of the above sub-section, to be expenditure incurred *solely* for the purpose of making the assessed income. In my opinion, therefore, the answer to the question is in the negative.

K. P. Jayaswal and *N. N. Roy*, for the Assessee.

C. M. Agarwalla, for the Crown.

JUDGMENT

COURTNEY TERRELL, C.J.:—The facts which have given rise to the present reference may be simply stated. The assessee is the Receiver and manager appointed by the High Court of Calcutta to take charge of and manage the property known as the Jharia Raj estate. He was appointed in proceedings in which the widows of the late proprietor sued the present proprietor and he was appointed at a salary of Rs. 1,000 a month. The property of the Raj consists, to the extent of an annual income of about 6 lakhs of mining royalties and to the extent of about Rs. 60,000 of agricultural income which of course is not taxable under the Indian Income-tax Act. The assessee claimed under section 12 (2) of the Act to deduct his salary as an allowance for expenditure incurred solely for the purpose of making or earning the income of the estate. The Income-tax Officer allowed as deduction one half of the salary. The matter went on appeal before the Assistant Commissioner and he disallowed the salary altogether as a deduction on the ground as stated by him that the purpose of the appointment of the Receiver was merely that he might look after the interests of the parties to the litigation and that he was not appointed for the purpose of

earning the income of the estate. This view of the matter has been upheld by the Commissioner on appeal and the case reaches us for final decision.

Firstly, it may be said that so far as the assessee's position as a manager is concerned the mere fact that he was appointed by the Court by reason of litigation to my mind makes no difference at all. He is in exactly the same position as though he were a manager appointed on behalf of a minor or a sick person who could not personally manage the estate and was forced to have somebody appointed for that purpose. His functions are twofold. He has to manage that part of the estate of which the income is not assessable, that is to say, the agricultural part of the estate, and he also has to manage that part of the estate of which the income is taxable, that is to say, the property which produces the mining royalties. Sub-section (2) of section 12 of the Income-tax Act is as follows:—"Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee."

Now it is contended on behalf of the Department that the true construction of this section is that if any part of the salary paid to the manager is to be attributed to some function other than that attributable to the making or earning of the taxable income, no part of the aggregate salary may be split off and treated as attributable to the making or earning of the income. But in my opinion sub-section (2) does not require that the whole of the Receiver's salary should be incurred solely for the purpose of earning income before any part of it can be deducted even if such part may represent no more than the Receiver's services in earning the income. The most cogent illustration of the position was that I think offered in the course of the argument by my brother Dhavle who put the case in this way:—Suppose that there had formerly been two managers, one to manage the agricultural part of the estate and the other to manage the royalty part and suppose the former was paid Rs. 200 a month and the latter Rs. 800 a month. In such circumstances it could not be doubted that the salary paid at the rate of Rs. 800 a month could be deducted as being incurred solely for the purpose of making or earning the royalty income. But if it was found as a matter of convenience better to appoint a single manager at Rs. 1,000 a month to carry on both such functions, if that course were taken could it be argued that no part of the salary of such a manager could be attributed to the earning of the royalty income? In my opinion the answer to the question propounded, that is to say is any portion of the salary of the Receiver allowable as expenditure under sub-section (2) of section 12? should be in the affirmative. We are not called upon to state what the proportion attributable to the tax-paying part of the estate is or what amount should be deducted. That will be for the proper tribunal when the question arises. The assessee having succeeded in his contention should, in my opinion, receive Rs. 200 as his costs.

DHAVLE, J.:—I agree.

(455) IN THE HIGH COURT OF JUDICATURE AT PATNA

Before Sir Courtney Terrell Kt., Chief Justice and Mr. Justice Davle.

[22nd May 1931]

Surya Prasad Mahajan .. *Assessee*

v.

The Commissioner of Income-tax, Bihar and

Orissa .. *Referring Officer.*

Income-tax Act (XI of 1922) Sec. 66—Loans, realisation of—Allotnent between principal and interest—Reference withdrawn—Costs, award of.

Where a reference on the question whether there was evidence before the Income-tax Officer on which he should have held that half the principal loan should be set off against the realisations in computing the profits of the previous year, was not pressed as the set off of the entire principal loan was given in the succeeding year of assessment, the High Covrt in the circumstances of the case awarded costs to the assessee.

Case [Miscellaneous Judicial Case No. 58 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa for the opinion of the High Court.

CASE.

The question of law which is being referred for the decision of the Hon'ble Court arises out of the assessment of the profits of the moneylending business of Babu Suryya Prasad Mahajan of Gaya, herein-after termed the assessee, for the year of assessment 1928-29. The assessee keeps his books according to the system of cash accounting. The accounting period or previous year in question is the Sambat year 1983-84 being the period from the 3rd Agrahayan 1983 to the 2nd Agrahayan 1984 or the 19th November 1926 to the 11th November 1927. The assessee's books showed a realisation of Rs. 5,000 interest from one S. P Singh. Questions by the Income-tax Officer revealed that the realisation on this loan in the previous year was actually much greater than the sum shown. The facts, which are not disputed, are as follows:—

In 1903 the assessee lent Rs. 30,000 to the aforesaid debtor, on mortgage of certain properties. A bond was executed for Rs. 30,000 principal and Rs. 14,580 prospective interest at 9 per cent per annum, the agreement being that the total sum of principal and interest should be repaid in 9 yearly instalments. The debtor paid Rs. 16,290 in three instalments, i.e., Rs. 14,580 interest and Rs. 1,710 principal. The principal remaining due on this loan was therefore Rs. 28,290. Further in 1905 the debtor took a second loan of Rs. 7,200 from the assessee at 12 per cent. per annum and in 1906 a third loan of Rs. 4,000 at 12 per cent per annum. The total principal of the three loans therefore amounted to Rs. 39,490. No further payment was made. The assessee sued the debtor, who died during the pendency of the litigation

and a decree for Rs. 1,26,766 was obtained against his son and grandson. The liability under the decree was divided by the courts equally between the son and the grandson, and it was provided that, if either paid his moiety share of that liability, his share in the mortgage properties should not be liable to be proceeded against in execution of the decree. In April 1927, the son paid the sum of Rs. 61,500 and in consideration of the cash payment, the remainder Rs. 1,883 of his share of the debt was remitted to him by the assessee. The grandson paid Rs. 5,000 in September 1927, and Rs. 10,000 on the 1st November 1927. All the above payments were received within the previous year. The balance due from the grandson was received in the year succeeding the previous year.

2. The assessee put forward two contentions before the Income-tax Officer. The first was that, though he had always kept his books on the cash basis, he had actually been assessed on accrued interest in the years between 1903-04 and 1919-20, and therefore in respect of the realisation in the previous year, he was entitled to be allowed credit for the amount of accrued interest which had been taxed in those years. The records show that in the year 1919-1920 and in subsequent years the profits of the assessee's money-lending business were computed in accordance with the method of accounting employed by the assessee viz., the cash system. The records of assessments prior to that year have not been preserved. The contention was disallowed by the Income-tax Officer. Secondly the assessee claimed to set off the principal in full against the profits on the ground that receipts should be allotted first to principal, next to costs and lastly to interest. The Income-tax Officer disallowed this second claim also and made assessment on the amount received namely, Rs. 76,500 minus costs Rs. 19,657, i.e., on Rs. 56,843. Here it may be mentioned that in the year succeeding the previous year the assessee's dues were fully paid up and a set off of the entire principal was allowed against the receipts. While there is any prospect of further realisations a creditor will not voluntarily allot receipt to principal before interest, for the reason that further interest accumulates on unpaid principal. The assessee's second contention was therefore plainly untenable, and he subsequently admitted as much before me.

3. The assessee appealed to the Assistant Commissioner. He put forward the above two contentions, and also, as an alternative to the second contention, submitted that, as the civil courts had split up the liability between the son and the grandson of the debtor, the loan had in fact become two loans so that one loan, i.e., the loan from the son, should be regarded as having been completely satisfied in the previous year, and therefore, in computing profits, a set off of the principal of that loan, namely half the principal of the original loan, should be allowed against the realisations in the previous year. The Assistant Commissioner disallowed all three contentions.

4. Thereafter the assessee required me by application under section 66 (2) to refer the case to the Hon'ble High Court. He formulated no question of law for reference, but only submitted certain grounds for consideration. When I gave him a hearing, the learned pleader who represented him was not able to put his contentions in the form of question of law. His submissions were firstly, that accrued interest taxed prior to the year 1919-1920 could not be taxed again in the previous year, and secondly that half the principal loan should be set off against the receipts for the reasons advanced before the Assistant Commissioner and set down above. He ad-

mitted that his original claim for set off of the whole principal was not maintainable.

5. In regard to the first submission the contention of the assessee that accrued interest was taxed prior to 1919-20 is a gratuitous assumption unsupported by evidence, and there is no alternative but to hold that the assumption is incorrect and the assessments of those years were made in accordance with the system of accounting adopted by him, viz., the cash system. On this finding of fact, therefore, no question of law can arise out of the first submission for reference to the Hon'ble Court.

6. The point of law arising out of the second submission is stated by me as follows:—"Was there evidence before the Income-tax Officer on which he should have held that half the principal loan should be set off against realisations in computing the profits of the previous year?"

7. My opinion on this question is as follows:—If the assessee had in his books made the allotment between principal and interest which he now claims to be allowed to do, then the Income-tax Officer would have had no grounds for objection. But the assessee neither made any such allotment in his books nor claimed before the Income-tax Officer to be allowed to do so. In fact, it is plain from the facts given above that even the thought of any such allotment did not occur to him until he realised that his actual claim before the Income-tax Officer was void of justification. The Income-tax Officer could not have allowed a claim which was not made. In my opinion the answer to the question is in the negative.

R. G. S. Prasad, for the Assessee.

C. M. Agarwalla, for the Crown.

JUDGMENT.

The question referred to this Court in this case is "Was there evidence before the Income-tax Officer on which he should have held that half the principal loan should be set off against realisations in computing the profits of the previous year?" This was raised before the Assistant Commissioner in appeal but does not seem to have been considered by him. The Income-tax Commissioner in his statement of the case answers the question in the negative on the grounds that the assessee had not made any allotment between principal and interest in his books and that he did not make this precise claim before the Income-tax Officer. The Assistant Commissioner has however referred to the decree under which the liability of the two judgment-debtors was divided and divided in the presence of the assessee. One complication was introduced into the case by reason of the fact, which is mentioned by the Income-tax Commissioner and is common ground before us, that in the year succeeding the year of assessment the assessee was given a set off of the entire principal on the other judgment-debtor paying up in full the part which was due from him. In these circumstances the learned Advocate for the assessee has informed us that he does not wish to press the reference but that he must ask for costs on the ground that there were materials before the Assistant Commissioner on which he should have split up the debt between the two debtors and allowed the assessee a set off of half the debt in respect of the debtor who had made a payment of Rs. 61,500 in the year of assessment in discharge of his entire

debt. We accordingly make no order in the case except to say that the reference is not pressed by the assessee and that the assessee is entitled to the costs of the hearing which we put at Rs. 200.

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(456) IN THE HIGH COURT OF JUDICATURE AT LAHORE.

FULL BENCH

Before Sir Alan Broadway, Kt., Judge, Mr. Justice Dalip Singh and Mr. Justice Tapp.

[5th June, 1931]

Dr. Umar Baksh .. *Assessee*
v.
The Commissioner of Income-tax, Punjab .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 4 (3) (1) and 66 A (1)—Property held as Wakf—Income utilised for donor and his children—Ultimate benefit to poor—Exemption from assessment—Religious and charitable purposes, meaning of—Applicability of English law—Difference of opinion in Division Bench—Reference to Full Bench—Civil Procedure Code, Sec. 98.

Property held under a wakf created for the maintenance of the donor and his children and thereafter for the maintenance and support of his family, the ultimate benefit on the extinction of his line being reserved for orphans and widows, is not property held under trust wholly for religious or charitable purposes within the meaning of Sec. 4 (3) (1) of the Income-tax Act, so long as the income therefrom is employed for the maintenance of the donor and his children.

The expression "religious or charitable purposes" in Sec. 4 (3) (1) has to be construed with reference to English law and not to the personal law of the assessee.

Where the Judges constituting the Bench hearing a reference under the Income-tax Act after signing judgments expressing differing opinions agreed to refer the matter to a larger Bench and a Full Bench was thereupon constituted by the Chief Justice,

HELD on a preliminary objection that the Judges of the Division Bench having become functus officio, *the Commissioner's opinion should prevail under Sec. 66 A of the Income-tax Act read with Sec. 98 of the Civil Procedure Code, that the Full Bench had jurisdiction to hear the Reference.*

Case [Civil Reference No. 12 of 1930] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab for the opinion of the High Court.

CASE.

By an application under section 66 (2) of the Income-tax Act (XI of 1922), I have been asked to refer for the decision of the High Court a ques-

tion of law arising out of the order passed under section 31 of that Act by the Assistant Commissioner of Income-tax in connection with the assessment for the year 1928-29 made by the Income-tax Officer, Jullunder, on Dr. Umar Bakhsh of Hoshiarpur.

2. **Facts of the Case:** The facts of the case are simple and have been correctly stated in the assessment and appellate orders. The only source of income which has been subjected to assessment is property, and the income derived therefrom during the accounting period ending 31st March 1928 was Rs. 3,504. By a deed dated 18-10-'27 the assessee, who is a Hanafi Mussalman, created in respect of this property a waqf, the relevant provisions of which are to the following effect:—

> I create a perpetual trust of the property noted above for the maintenance of myself, as long as I am alive, and for the maintenance of my children according to the Mohammadan Law and (the Waqf Validating) Act VI of 1913 to earn blessings in the next world, and from the date of this deed according to the conditions laid down in the deed, I release from my possession as a proprietor the property in question and take possession of the said property as a Mutwali. The conditions of the trust shall be as under:— (1) I will remain in possession of the said property as Mutwali and manager during my life-time and will spend the income from the property according to my own wishes for my own maintenance and that of my children and also for religious or charitable purposes." The other clauses of the deed lay down that the income from the property shall be enjoyed by his descendants, male and female, till his line becomes extinct, in which event the property shall be managed by some Mohammadan Association for the benefit of orphans and widows.

On the strength of this deed the assessee claimed before the Income-tax Officer that the income derived from the property after the execution of the deed was exempt from tax because it was thenceforward no longer his property but was held under trust wholly for religious or charitable purposes within the meaning of section 4 (3) (i). The Income-tax Officer refused to accept this contention, as he held that the maintenance of the assessee and his family was not a purely religious purpose. He accordingly assessed the total income for the whole year in the hands of the assessee. An appeal was presented to the Assistant Commissioner who supported the view taken by the Income-tax Officer and rejected the appeal in so far as the consideration of the effect of the waqf deed was concerned, though he reduced the assessment in another respect which is not relevant to the present reference. I have now been asked either to revise the assessment under section 33 as desired by the assessee, or to refer the matter for the decision of the Hon'ble High Court. I have declined to interfere with the assessment in the exercise of my powers under section 33, and accordingly refer the matter for the decision of the Hon'ble Judges.

3. **Question to be referred:** The question for decision may be formulated as follows:—"Whether the property held under this waqf is property held under trust wholly for religious or charitable purposes within the meaning of section 4 (3) (i) of the Income-tax Act, or whether it is property so held in part only for such purposes." It is clear that if the former view be correct, as contended by the assessee, the whole of the income from this property would be exempt from income-tax, whereas if the latter is the correct view, only the income applied, or finally set apart for application,

to religious or charitable purposes will be exempt. I may add that it is not claimed that any part of this income was applied to any other purpose than the maintenance of the assessee or his family during the relevant accounting period.

4. **Opinion of the Commissioner:** In my opinion the answer to the question referred is that the property is held in part only for religious or charitable purposes within the meaning of section 4 (3) (i) of the Act, and that exemption from income-tax will only be admissible if and when the income, or any part of it, is in accordance with the waqfnama applied or finally set apart for application to religious or charitable purposes, and then only on the income so applied or set apart. The assessee being a Hanafi Mussalman, the waqf created by him for his own maintenance and support during his life-time and for the maintenance and support of his family is no doubt valid according to section 3 of Act VI of 1913 (the Mussalman Waqf Validating Act), since it complies with the proviso to that section by reserving the ultimate benefit, after the extinction of his line, to the poor. In my view the income of the waqf will be exempt from income-tax when the contingency occurs which makes the income available for the relief of the poor. The assessee however contends that the maintenance of his family and himself is, according to the Mohammadan Law, itself a pious purpose and falls within the scope of section 4 (3) (i) of the Income-tax Act. In my opinion it is not a religious or charitable purpose within the meaning of that section. It appears to me that if the assessee's contention were correct it would never have been necessary to enact the Mussalman Waqf Validating Act to give validity to such settlements, and that the proviso to section 3 of that Act would be otiose. The wording of that proviso, which insists that the ultimate benefit must be reserved "for the poor or for any other purpose recognised by the Mussalman Law as a religious, pious or charitable purpose of a permanent character" and that in the absence of such a condition the waqf shall not even be recognised as valid, indicates that the purposes enumerated in clauses (a) and (b) of the section are not in themselves regarded as religious or charitable purposes.

The decision in the case of *M. E. R. Malak* v. *Commissioner of Income-tax, Central Provinces*[1] appears to apply, *a fortiori*, to the case under consideration.

Dr. Shujaud Din, for the Assessee.

J. N. Aggarwal, for the Crown.

Order of Reference to Full Bench.

AGA HAIDAR, J.:—In my opinion the waqf created by the assessee comes within the provisions of section 4 (3) (i). Under the Muhammadan Law, waqf is the removal of the property from the ownership of its proprietor and tying it up to the ownership of God. In a valid waqf, the interests of the maker of the waqf as proprietor cease and the property passes into the ownership of God in perpetuity. The act of waqf is one single act. It is of a religious nature and is considered highly meritorious. Under the Muhammadan Law, which has been rehabilitated by the Mussalman Waqf Validating Act No. VI of 1913, after certain misapprehensions

1. 2 I. T. C. 448.

had arisen on the subject of waqf the rule is that a Hanafi Muhammadan can make a waqf of his property for his own maintenance and for that of his children and descendants, provided there is the ultimate appropriation of the property for the benefit of the poor and needy or other recognised pious, charitable or religious objects. There is a difference of opinion among the Muhammadan Jurists, some of whom say that even if the poor are not expressly mentioned, a waqf otherwise valid, would not fail, because the poor who are always with us are by implication the ultimate beneficiaries of all waqfs, while others require that a specific provision should be made in the deed of waqf itself for the appropriation of the usufruct of the property for the benefit of the poor or for other religious purposes of a pious and charitable character according to the Muhammadan Law, after the primary objects specified by the waqf have been exhausted. It was apparently in order to settle this difference of opinion that the proviso has been added to section 3 of the Mussalman Waqf Validating Act.

Sometimes the Muhammadan Law on this subject is not properly understood; but there cannot be any manner of doubt that, according to Muhammadan Law, a man who makes provision for himself and for his children and descendants is in reality doing a meritorious act from the point of view of the religion which he professes and is not merely acting as a good citizen who is making provision for himself and his family. Therefore, if once these elementary rules of the Mussalman Law of Waqf, which have been re-affirmed by the Legislature in the form of the Mussalman Waqf Validating Act (No. VI of 1913), are clearly understood in the light of recognised authorities on the Muhammadan Law, the case does not present any difficulty. As already stated, the act of dedication whereby the owner divests himself of all proprietary interest in the property and consecrates the same in perpetuity to the detention of God, is one single juristic act which is incapable of being dissected for the purpose of determining as to which part of it is "wholly for religious or charitable purposes" and which is not. The terms of the Waqfnama in suit, as reproduced in the order of reference made by the learned Commissioner, are that the waqf appointed himself as the mutwalli for his lifetime and made provision for his own maintenance and that of his children and also for religious or charitable purposes, and there is a clear provision that, when the line of his descendants becomes extinct, the property shall be devoted to the service of the orphans and widows. These terms *prima facie* bring the case within the operation of the Mussalman Waqf Validating Act and the general Mussalman Law on the subject and the income of the property would be exempted under the provisions of section 4 (3) (i) of the Indian Income-tax Act (No. XI of 1922).

No case has been cited by either party having any direct bearing on the question involved in the reference, though Mr. Jagan Nath Aggarwal, who represented the Income-tax authorities, quoted the case of *M. E. R. Malak* v. *Commissioner of Income-tax, Central Provinces*,[2] which has also been relied upon by the learned Commissioner of Income-tax. This case went up to the Privy Council. All that I can say is that this precedent has no bearing whatsoever on the point before me. In that case a certain document was placed before the Court and their Lordships of the Privy Council held, on a consideration of the terms thereof, that it could not be treated as a valid deed of waqf under the Muhammadan Law. This was the sole point decided by their Lordships of the Privy Council. The terms of that

2. 2 I. T. C. 443.

document were entirely different from those of the Waqfnama now before me. That case, therefore, does not help either party.

In this connection the definition of "Waqf" in the Mussalman Waqf Validating Act, No. VI of 1913, may be mentioned. According to this definition, "Waqf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable." I may mention that this definition is substantially the same as the one already given, though it lacks the directness and simplicity of the original Arabic texts. Now if, after the enactment of the Mussalman Waqf Validating Act, the rules of the English law of trusts are once again invoked in aid in order to interpret the meaning of the words "religious, pious or charitable," we once again go back to the vicious circle which the Legislature had sought to put an end to by placing the said Act on the statute book. It must be remembered that the Income-tax Act, XI of 1922, is an Act of the Indian Legislature and was intended to operate among the various communities of India which profess different religions. An object may be religious or charitable according to the ideas prevailing in one community, but it may not be so according to the notions of another community. Therefore, the proper mode of interpreting section 4 (3) (i) of the Indian Income-tax Act so far as the present reference is concerned, is to find out whether, according to the personal law of the assessee, the dedication, in reality and in fact, amounted to the permanent tying up of the property to the ownership of God. The answer should be given according to the religion which the assessee professes and the notions of religion and charity as understood by him. If a Mussalman were to dedicate certain property by providing that the holy Quran should be read daily in his family grave-yard for the peace and comfort of the souls of his ancestors, it would and undoubtedly be a religious purpose according to the tenets of the Muhammadan religion, but I dare say, that, according to the ideas of an Englishman professing the Protestant faith, it would be an objectionable practice, as it would be very much like the singing of the Holy mass for the benefit of the souls of the departed relations of a devout Roman Catholic. Therefore, I am clearly of opinion that these words should be interpreted in a reasonable manner in the light of the recognised authorities on Muhammadan Law and the terms of the Mussalman Waqf Validating Act which as stated above do not lay down any new rules but seek to re-affirm the principles of Muhammadan Law about the interpretation of which certain doubts had arisen.

It may further be observed that, in the present case, in making waqf of the property, the assessee has deprived himself permanently of all proprietary rights, and it is important to note that he had made immediate provision for the maintenance of his children who, ordinarily, in his lifetime would have no claims upon him but who, under the waqf created by the assessee, at once become the beneficiaries under the waqf in their own rights. Furthermore, there is also the immediate dedication for religious and charitable purpose.

This being my view, my answer to the first portion of the question formulated by the learned Commissioner of Income-tax is in the affirmative.

JAI LAL, J:—Under section 66 of the Indian Income-tax Act 1922 the Commissioner of Income-tax has submitted the following question for the decision of this Court:—"Whether the property held under this wakf is property held under trust wholly for religious or charitable purposes with-

in the meaning of section 4 (3) (i) of the Income-tax Act or whether it is property so held in part only for such purpose." My learned brother Agha Haidar proposes to answer the first part of the question in the affirmative, but after careful and anxious consideration I have found myself unable to agree with his opinion.

The facts of the case are mentioned in the order of reference and stated briefly are that on the 18th of October, 1927, Dr. Umar Bakhsh, the assessee, who is a Hanafi Mussalman of Hoshiarpur, created a wakf in respect of his property by means of a deed which provides that the property comprised therein shall vest in him as a Mutwalli and its income shall be applied by him for his own maintenance during his life-time and for the maintenance of his children and that thereafter it shall be utilised for the maintenance of his descendants. It further provides that on the extinction of his line, both male and female, the property shall be managed by some Muhammadan Association for the benefit of orphans and widows. The following is an extract from the deed:—"I will remain in possession of the said property as a Mutwalli and manager during my life-time and will spend the income from the property according to my own wishes for my own benefit and that of my children and also for religious and charitable purposes." It is not the case of the assessee that he has set apart any portion of the income of the property for religious or charitable purposes, or that he is actually applying the same for such purposes; on the other hand the case has been argued before us on the assumption, that the whole of the income is, at the present time, being devoted to the maintenance of the assessee and his family.

The answer to the question referred to us depends upon the correct application of section 4 (3) (i) of the Indian Income-tax Act to the facts of this case. That section exempts from the operation of the Act "any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto." The assessee's contention is that the property must be deemed to be held under trust wholly for religious or charitable purposes, and in support of this contention reliance is placed on the provisions of the Mussalman Waqf Validating Act, 1913, which purports to declare the rights of Mussalmans to make settlements of property by way of waqf in favour of their family, children and descendants with its ultimate application to religious, charitable or pious objects.

Before adverting to the provisions of this Act it would be appropriate to mention that the necessity to pass it arose because the courts in this country and the Privy Council had laid down that if the real motive or effect of the gift be to benefit the donor and his family and the dedication of the property to a charitable or religious purpose be illusory or remote then the gift must be held to be invalid. It has been held that the maintenance of the donor and his family or descendants was not a charitable purpose using that expression "in the English sense i.e., in the sense in which it is used in the decisions in the English Courts and in the translations into English." Some Judges had even held the view that according to the Mussalman Law also such a provision could not be held to be charitable.

A reference to some of the leading cases on the subject must be made but it is not necessary to cite cases decided before *Bikani Mia* v. *Shuk Lal*

Poddar and another,[1] where the whole of the previous case law and most of the original texts on the subject were cited and reviewed. In that case Ameer Ali, J., dissented from the other members of a full bench of the Calcutta High Court and maintained that in order to determine the validity of a waqf the question whether the object thereof is charitable or not should be decided according to the canons of the Mussalman Law and that according to them the maintenance of the settlor, his family and descendants would be a charitable purpose. Some of the other Judges, however, were of opinion that even according to the Mussalman Law such an object could not be held to be charitable, but they were all agreed (i.e., all except Ameer Ali, J.) that the expression "charitable" should be assigned a meaning analogous to that which has been assigned to it in the English Law and that therefore the maintenance of the settlor and his descendants was not a charitable purpose. Ameer Ali, J. has adhered to his views in his Muhammadan Law and it seems that the same opinion has been expressed by Tyabji in his Law and Principles of Muhammadan Law.

The question next came up for consideration before their Lordships of the Privy Council in *Abdul Fata Mohd Ishak and others* v. *Rasamaya Dhur Chowdhri and others*.[2] Their Lordships held that the view of Ameer Ali, J. was not in accordance with the Muhammadan Law and upheld the opinion of the majority of the learned Judges of the Calcutta High Court taken in *Bikani Mia* v. *Shuk Lal Poddar and another*.[1] In that case Lord Hobhouse in delivering the judgment of the Court observed as follows:— "Among the very elaborate arguments and judgments reported in *Bikani Mia's* case some doubts are expressed whether cases of this kind are governed by Muhammadan Law; and it is suggested that the decision in *Ahsanullah Chowdhery's* case displaced the Muhammadan Law in favour of English Law. Clearly the Muhammadan Law ought to govern a purely Muhammadan disposition of property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Muhammadan Law as known as administered in India; but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their lordships know, have had their effect in moulding the law and practice of Wakf, as the learned judge says they have. But it would be doing wrong to the great lawgiver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words". And again "Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety and so to legalize arrangements meant to serve for the aggrandizement of a family".

In *Muthukana Ana Ramanadham Chettiar* v. *Vada Levvai Marakayar and others*[3] decided by a Division Bench of the Madras High Court consisting of Benson and Abdur Rahim, JJ., their Lordships summed up the law

1. I. L. R. 20 Cal. 116.
2. I. L. R. 22 Cal. 619.
3. I. L. R. 34 Mad. 12.

as follows:—"The effect of the Privy Council decision seems to be that wakf in Mohammadan law is a gift of property for charitable or pious purposes; that in this connection 'charitable', 'pious' or 'religious' purposes must be understood in their ordinary or natural meaning, i.e., in the sense analogous to that of the English law. Aggrandisement of the donor's descendants without any limit of time is not a charitable and pious purpose as contemplated by the Mohammadan law of wakfs, and a gift for the benefit of a man's own family, relatives or descendants is not charitable nor pious within the meaning of the law of wakfs. That a gift to charity would be deemed to be illusory if the provisions of the deed show that such gift is not to take effect, if at all, until after an indefinite period of time while those who are really meant to be benefited are the donor's relatives and descendants to the remotest degree; and that in such a case general expressions of piety and of charitable motives on the part of the donor are to be treated as a mere cloak to hide the real nature of the transaction." This in my opinion, is a succinct statement of the law on the subject as administered in the courts of British India prior to the Validating Act.

This rule had consistently been followed by the courts in this country till the Mussalman Wakf Validating Act of 1913 was passed; not only that till recently it has been applied to every wakf created before the Act came into operation. In a recent case from this Province *Balla Mal* v. *Atta Ullah Khan*[1] their lordships of the Privy Council after reviewing the provisions of the Mussalman Wakf Validating Act, 1913 and after observing that the test for the validity of a wakf laid down in the previous cases may sometimes be difficult of application specially as since the passing of the Act the courts will not be disposed to construe the provisions of the deed too strictly observed as follows:— "But still the question must remain whether the properties included in the wakf have been substantially dedicated to charity, or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Muhammadan Law of succession." This case was not governed by the Validating Act.

These cases clearly establish the proposition that the maintenance of the donor and his family was not considered by the highest courts in this country to be a charitable object of a gift and that 'charitable' was interpreted in its English sense and further that it was at least questionable whether even according to the Mussalman Law such an object would be deemed to be charitable.

For the purposes of the present reference, however, it is not necessary to decide whether the object in such cases is charitable according to the definition of that term contained in the original texts of the Mussalman Law as we are not concerned with the validity or otherwise of the wakf but with the liability of the income of the wakf property to income-tax having regard to its present disposition or application and this question should in my opinion be decided according to the definition of the term "charitable" as used in the Indian Income-tax Act and not to borrow from Amir Ali J., in the Mohammadan senses. This Act closely follows the lines of the English Statute on the subject and in the absence of a clear indication or implication to the contrary the expressions used therein should be assigned the same meaning as they bear in England. It is mainly for this reason that I have cited the leading cases on the subject as they clearly show in what sense the term "charitable" is understood in England and consequently in the British Indian

4. I. L. R. 9. Luh. 203.

courts; moreover the counsel for the Commissioner strongly relied on them, while the counsel for the assessee contended that they were not in accordance with the Mussalman law.

In *Ibrahim Khan* v. *Ahmad Saeed Khan*,[5] Karamat Hussain, J., when delivering the judgment of the Division Bench observed as follows as to the meaning of charity at page 769 of the report:—"As the term 'charity' has been imported from the English Law, it is desirable to give a definition of that term as was understood in that law. The preamble to statute 43, Elizabeth contains an enumeration of charitable objects. The relief of aged, impotent and poor people is among these objects. See Tudor on Charities, page 33, 4th edition. The same author on page 37 says; 'The purposes which have been held charitable within the language or spirit of this preamble, may be grouped under four heads:—(1) the relief of poverty; (2) education; (3) the advancement of religion; (4) other purposes beneficial to the community not falling under any of the preceding heads. These may be conveniently termed general public purposes'. In the first place it may be laid down as an universal rule that the law recognises no purposes as charitable unless it is of a public character; that is to say, a purpose, must in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine. The principle deducible from the cases seems, however, to be as follows:—If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purposes charitable within the meaning of the Statute of Elizabeth, without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is charitable.

Lord Halsbury L. C. in *Commissioner of Income-tax* v. *Pemsal*,[6] says:—"To come now to the particular bequests before us, and to the use of the word 'Charitable' in the Act we are construing, I would say, without attempting an exhaustive definition or even description of what may be comprehended within the term charitable purpose, I conceive that the real ordinary use of the word 'charitable' as distinguished from any technicalities whatsoever, always does involve the relief of poverty".

I must, however, advert to the contention of the learned counsel for the assessee that the Mussalman Wakf Validating Act, 1913, has not only had the effect of validating the gifts which would have to be held invalid according to the previous decisions but that it has also superseded the view of the courts that the term charitable should bear the same meaning as in the English law and that the maintenance of the settlor and his family is not a charitable object. It was consequently contended that for the purposes of the exemption contained in section 4 (3) (i) of the Indian Income-tax Act charitable purpose should be assigned the same meaning as in the Validating Act. This, as I have already stated, is by no means the correct view, but I am also of opinion that the Validating Act has done nothing more than to validate certain gifts which otherwise would have been invalid. It does not purport to define what is a charitable object, nor does it profess to lay down any rule for interpreting the term other than that which already prevailed.

5. (1910) 7 All. L. J. 761.

6. (1891) A. C. 531 at p. 552; 3 Tax. Cas. 53.

Now, in the Mussalman Wakf Validating Act, 1913, wakf has been defined to mean the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman Law as religious, pious or charitable. Section 3 provides that it shall be lawful for any person professing the Mussalman faith to create a wakf, where the person creating a wakf is a Hanafi Mussalman, for the maintenance and support wholly or partially of his family, children or descendants, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated, provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. The Act further provides that no wakf shall be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

From the above it would seem that every object of a valid wakf need not necessarily be religious, pious or charitable. It is only the ultimate object which, even if remote or illusory, must be such. This is clear from the fact that a wakf is valid even if its intermediate object be the payment of the debts of the donor. It is hardly possible to contend with any justification that such an object is religious, pious or charitable. It therefore, appears to me that under the provisions of the Act it is the charitable character of the ultimate destination of the property of a person connected with a desire directly or indirectly to please a divine ruling power or a purpose subservient to worship of God or a God. A charitable purpose on the other hand implies some act which has as its object relief to the poor and helpless. It must in addition imply self-abnegation.

I have already observed that it is not alleged in this case that at the present moment any portion of the income is set apart or utilised for religious or charitable purposes in the sense in which I understand those expressions to have been used in the Indian Income-tax Act. Is it under the circumstances open to the assessee to contend with any justification that the property is wholly dedicated to a charitable or religious purpose? In my opinion it is not. The ultimate disposition of the property which is remote, no doubt is for a charitable purpose but the intermediate gift is certainly for a secular and non-charitable purpose, that is to say, a provision for the family of the donor. The dedication cannot, therefore, be termed as wholly for a charitable or religious purpose. 'Wholly' in Maulena M. E. R. *Malak* v. *Commissioner of Income-tax, Central Provinces*,[7] which was subsequently upheld by the Privy Council, has been held to be closely akin to 'solely' by a Division Bench of the Nagpur Judicial Commissioner's Court, and if I may say so with respect rightly. By no stretch of language can it be urged that the property in question has been wholly or solely dedicated to a charitable or a religious purpose because in my judgment one of the purposes of the dedication is not charitable, i.e., provision for the family of the donor.

To sum up, my judgment is that the Mussalman Wakf Validating Act does not in any way affect the interpretation of the expression religious or charitable purpose of property dedicated which determines the validity of the wakf and not the immediate or intermediate use thereof. If it had been the intention of the Legislature that the maintenance or support of the settlor and his family and the payment of his debts should be deemed to be a religious, charitable or pious purpose then such an intention could easily have

7. 2 I. T. C. 443; 4 I. T. C. 486.

been carried out by expressly saying so and in that case it would not have been necessary in order to get rid of the effect of the existing judicial authorities, to enact sections 3 and 4 of the Act. These sections and their phraseology indicate, in my opinion, that the Legislature recognised that such purposes could not with justification be declared to be charitable. I cannot assume that the Legislature attempted to attain its object in a round about way instead of directly stating what is intended to state in a short definition.

It was not the case of the assessee as developed before us that the immediate object of the wakf in the present case is religious; it was claimed, however, to be charitable. It may be as contended by the learned counsel for the assessee that it is the religious duty of every Muslim to maintain himself and his family and further that this is an act of best alms giving or of profound charity according to the Muslim religion; still, in my opinion, the object of the gift, that is the maintenance of the settlor and his family, does not thereby become a religious object. There are several rules of conduct which are enjoined by almost every religion, but it is impossible to hold that they are all religious objects or that their observance becomes a religious purpose. The expression 'religious purpose' in my opinion is used in both the Acts in a restricted sense and implies a purpose as used in the Indian Income-tax Act and the question before us must be answered on an interpretation of the expression religious or charitable on the analogy of the English law, that is to say, as the terms are understood in their natural and literal sense and in the English courts and the authorities prior to the passing of the Mussalman Wakf Validating Act 1913 in which this expression has been interpreted are still good law and must be followed when deciding whether the object is religious or charitable and further the maintenance of the donor and his descendants is not a charitable purpose, much less a religious purpose and therefore the wakf in the present case cannot be held to be wholly for a religious or charitable purpose within the meaning of section 4 (3) (1) of the Income-tax Act. As the learned Commissioner of Income-tax has assumed in the question framed by him that if the property be deemed not to be held under trust wholly for religious or charitable purpose then it must be deemed to be so held in part only for such purpose, I hold that the property in this case is held in part only for religious or charitable purpose.

I wish to make it clear that it was not urged by the counsel for the Commissioner before us that in this case the income in the hands of the assessee as the beneficiary under the wakf is liable to income-tax on the ground that it cannot then be deemed to be devoted to religious or charitable purposes and indeed this matter does not arise on the reference, nor did the learned counsel for the assessee attack the assessment on any ground that the maintenance of the settlor and his family must, after the Mussalman Wakf Validating Act, be held to be a charitable purpose.

In my opinion the assessee must pay the costs of this reference.

JAI LAL, J.:—I have read the additions which have now been made to this judgment by my learned brother but regret to say that I still adhere to my opinion already expressed in my judgment. The question involved is an important one and I suggest, if my learned brother agrees, that the case be placed before the learned Chief Justice to be heard by a bigger Bench.

SHADI LAL. C.J.:—Let the case be heard by a Full Bench.

AGHA HAIDAR, J.:—I agree.

Dr. Umar Bakhsh, Assessee in person.

J. N. Aggarwal, for the Crown.

JUDGMENT.

DALIP SNGH, J.:—The following question has been referred to the High Court under the provisions of section 66 (3) of the Income-tax Act, namely:—Whether the property held under this wakf is property held under trust wholly for religious or charitable purposes within the meaning of section 4 (3) (i) of the Income-tax Act, or whether it is property so held in part only for such purposes".

The relevant terms of the wakf in question are as follows:—"I create a perpetual trust of the property noted above for the maintenance of myself, as long as I am alive, and for the maintenance of my children according to the Mohammadan law and the Wakf Validating Act of 1913, to earn blessings in the next world, and from the date of this deed according to the conditions laid down in the deed, I release from my possession as a proprietor the property in question and take possession of the said property as a Mutwalli. The conditions of the trust shall be as under:—(1) I will remain in possession of the said property as a Mutwalli and manager during my lifetime and will spend the income from the property according to my own wishes for my own maintenance and that of my children and also for religious or charitable purposes". Other clauses of the deed lay down that the income from the property shall be enjoyed by the descendants, male and female, of the donee till his line becomes extinct, in which case the property shall be managed by some Mohammadan Association for the benefit of orphans and widows.

The assessee claimed that the income derived from the property after the execution of this deed on the 18th of October 1927 was not assessable to income-tax inasmuch as the property was held under trust wholly for religious or charitable purposes within the meaning of section 4 (3) (i) of the Income-tax Act. The Income-tax authorities refused to accept this contention and in the opinion of the Commissioner the income was not exempt until in accordance with the wakfnama the whole or any part of that income was applied or finally set apart for application to religious or charitable uses as provided in the wakfnama. The learned Commissioner was of opinion that the wakf might be valid owing to the Mussalman Wakf Validating Act of 1913, but according to him on a proper construction of that Act the reservation of the income for the benefit of the donee and his successors could not be described even under the Mussalman Law as a religious or charitable purpose. He relied on the case of *Malak v. Commissioner of Income-tax, Central Provinces.*[8]

The case went before a Division Bench of this Court and the learned Judges having differed in opinion the matter has been referred to a larger Bench for decision.

A preliminary point was raised by the learned counsel for the Income-tax Commissioner that the reference was invalid as under the terms of section 66 (3) of the Income-tax Act the provisions of section 98, Civil Procedure Code, shall apply to such a reference notwithstanding anything contained in the Letters Patent of any High Court. His argument was that, as the learned Judges had differed and had expressed their opinions in judgments signed and dated by them, they were *functus officio* and as there was no majority, one way or the other, the opinion of the Income-tax Commissioner should prevail. I do not think there is any force in this preliminary

8. 2 I. T. C. 443; 4 I. T. C. 486.

objection. In all such cases the question is one of intention and it is clear from the record that the learned Judges did not intend that their decision should be taken as final. Both agreed, in view of the difference of opinion, to refer the matter to a larger Bench through the learned Chief Justice. The order of the Chief Justice was: "Let the case be heard by a Full Bench". But the mere existence of the words "Full Bench" as distinguished from the words used by the learned Judges "a bigger Bench" does not mean that the learned Chief Justice contemplated anything more than that a larger Bench should decide the case in view of the difference of opinion and the importance of the point involved. I find, if authority were needed on the point, in *Karalicharan Sarma* v. *Apurbakrishna Bajpeyi*,[9] the learned Judges who differed there had written out full judgments and then agreed to refer the case to the decision of a third Judge. I would therefore, overrule this preliminary objection.

To turn now to the merits of the question, in my opinion, there can be only one answer to the question referred to the High Court, but in view of the difference of opinion of the learned Judges, who originally heard the case, I propose to deal with the matter at some length. The first question that arises is, what principle of construction should be adopted in construing the words "religious or charitable purposes" in the Income-tax Act. The contention of the assessee before us was that the words should be construed with reference to the personal law of the particular assessee in question. The contention of the learned counsel appearing for the Income-tax Commissioner was that the words should be construed either in their plain grammatical sense or in accordance with the principles of English Law. Now I find that in *The Commissioners for Special Purposes of Income-tax* v. *John Frederick Pemsel*,[10] the matter was considered with reference to the Income-tax Act in England where the question was whether a certain gift was for charitable purposes or not. At page 548 Lord Halsbury in his dissenting judgment observed as follows:—"I also think the true view of the construction of an Act which is to apply to England, Ireland, and Scotland alike, is that it ought to be construed according to the canon of construction laid down by the Court of Session in the case of *Baird's Trustees* v. *Lord Advocate*.[11] It is a rule which has been acted on not only in respect of taxing Acts, but of other enactments. Indeed, it is only part of a general principle of common sense which Mr. Justice Grose laid down in a rating case: *R. V. Hogg*,[12] "a universal law cannot receive different constructions in different towns". And if (to quote the language of Lord Justice Fry), words construed in their technical sense would produce inequality, and construed in their popular sense would produce equality, you are to choose the latter".

In spite of verbal criticisms that might be applied to the language Lord Halsbury was of opinion that the above principle was a sound one. He also accepted the dictum of Lord Campbell: "In construing the statute on which the case depends we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the legislature must be understood to be that the like interests in property taken by succession should be subjected to the like duties, wheresover the property may be situated. The technicalities of the laws of England and Scotland where they differ, must be disregarded, and the language of the legislature must be taken in its popular sense". Applying this construction Lord Halsbury was of opinion

9. I. L. R. 58 Cal. 549.
10. (1891) A. C. 531.
11. 15 Sess. Cas. 4th Series 682.
12. 1 Ter. Rep. 728.

that the gift in question did not come within the meaning of the words "charitable purposes". Lord Bramwell agreed. Lord Watson, while fully agreeing with the judgment of the majority, as given in the judgments of Lord Macnaghten and Lord Herschell, was of opinion that the ordinary sense of the words "for charitable purposes" would include the gift in question. Lord Herschell was also of that opinion if the popular sense was to be adopted for the purposes of construction. He thought, however, that there was no distinction between the English and the Scotch legal construction. Lord Macnaghten was of opinion that while there was no vital difference between the English and Scotch Law on the point yet on the principle of construction he preferred the rule laid down by Lord Hardwicke that "you must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries".

From these dicta I gather that according to the cardinal principles of construction of a statute which, like a taxing statute, is meant to apply to all persons irrespective of their personal law, the canon of construction must be either to take the plain grammatical meaning of the words used or to take the legal construction from the jurisprudence of the country in which the statute was drafted and apply it as far as possible so as to make the effect of the statute equal whether in a sister conutry or to sister communities following a different system of jurisprudence. In my opinion, therefore, for the purposes of construing the words "religious or charitable purposes" in the Income-tax Act it is quite unnecessary to investigate the meaning of the words in the particular sytem of jurisprudence that may be followed by the assessee. Such being the case, humbly agreeing with the opinion of Lord Macnaghten and of the majority of the Judges in the Appeal Case cited, I would hold that it is proper to construe the term with reference to the English Law on the point, especially as the draft was made in the English language and by persons presumably acquainted with the English Law on the point

Many other considerations fortify me in this view. Firstly even if the principle of construction suggested by Lord Halsbury were adopted the result, in my opinion, would be the same in the present case. Secondly, it is not in the least likely that the legislature in using the words in question expected the Income-tax authorities to go into the complicated questions of law that may arise, if they had to find out in each particular case the meaning of the words with reference to the personal law of the assessee. Thirdly, it is not in the least likely that the legislature intended to benefit any one community or any individuals of any one community at the expense of other members of different communities or of the same community. As pointed out by Lord Halsbury every remission of income-tax from one property or individual finally throws a heavier burden on other property and other individuals and the Legislature could hardly have contemplated such a contingency. In any case, I would not be prepared to hold so without much clearer words to that effect.

Applying then the above principle, I would hold that the property at the present time cannot be said to be in trust wholly for religious or charitable purposes and, therefore, it would follow that the income is assessable to income-tax while it is spent wholly, as admittedly it is at present, for the maintenance of the assessee and his children.

Even, however, if it be admitted that the principles of Mohammadan Law must govern the question it seems to me that the matter is concluded so far as this Court is concerned by the Judgment of their Lordships of the Privy Council in *Abdul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri.*[13] where their Lordships held that a deed, such as the one in question, did not constitute a valid wakf for religious or charitable purposes. In 1913 the Mussalman Wakf Validating Act was passed. Their Lordships had occasion to consider the effect of this Act in a case subsequent, namely, *Balla Mal and others* v. *Ata Ullah Khan and others,*[14] where admittedly the deed in question was valid under the Validating Act though it had been executed before that Act came into force. Their Lordships in that case held that the Act was not retrospective and that the wakf was invalid though they pointed out that in cases subsequent to the Validating Act the decision might be otherwise. It is clear, therefore, that their Lordships did not accept the contention that the Validating Act had declared the Mussalman Law to be other than what had been laid down by their Lordships in *Abdul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri.*[13] In *M. E. R. Malak* v. *Commissioner of Income-tax Central Provinces*[15] a case under the Income-tax Act, their Lordships pointed out that the Validating Act introduced a third element into the case namely, pious purpose as distinct from religious or charitable purposes. Their Lordships appear to have held that, while a gift for the maintenance of oneself and one's children with an ultimate reversion to the poor might be a gift for a pious purpose and the income devoted to the purpose might be income devoted to a pious purpose, but would not necessarily be an income devoted to religious or charitable purposes. No doubt the words of the deed in that case were different but their Lordships did in observing on the arguments of the learned counsel before them imply that the income was not necessarily devoted to religious or charitable purposes, because the deed under which the income was so devoted was valid under the Mussalman Wakf Validating Act of 1913.

The Validating Act from its terms clearly does not lay down that the judgment of the Privy Council in *Abdul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* was wrong and it is possible to construe that Act merely as validating certain gifts with an ultimate reversion to religious or charitable purposes as being valid which might otherwise not have been valid. It is also possible to construe it as drawing a distinction between a pious purpose and a religious or charitable purpose. Be that as it may, it is not open to this Court, in my opinion, in view of their Lordships' decisions above referred to, to hold that an income accruing from a property which has been dedicated to a wakf, which is solely employed for the maintenance of the assessee and his children is income devoted wholly to religious or charitable purposes within the meaning of section 4 (3) (i) of the Income-tax Act. On this ground too I would, therefore, hold that the income is assessable.

I would, therefore, return the above answer to the reference. The assessee must pay the costs which I would assess at Rupees one hundred.

BROADWAY, J.:—I concur.

TAPP, J.:—I concur.

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13. I. L. R. 22 Cal. 619.
14. I. L. R. 9 Lah. 203.
15. 2 I. T. C. 443; 4 I. T. C. 486.

[457] IN THE HIGH COURT OF JUDICATURE AT PATNA

..FULL BENCH

Before Sir Courtney Terrell Kt., Chief Justice, Mr. Justice Wort, Mr. Justicc Kulwant Sahay, Mr. Justice Fazl Ali and Mr. Justice Dhavle.

[26th June, 1931.]

Kunwarji Ananda .. *Assessee.*

v.

The Commissioner of Income-tax, Bihar & Orissa. .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 22 (2), 23 (4), 30, 31 & 66—Non-submission of return, Assessment on—Appeal to Assistant Commissioner raising non-liability—Maintainability—Ord rejecting appeal, if one under Sec. 31—Question of law, if arises of reference—Scope and limits of reference.

A person assessed under Sec. 23 (4) of the Income-tax Act for non-submission of return is not entitled to prefer an appeal to the Assistant Commissioner on the ground that no part of his income accruing or arising in British India, he was not liable to be assessed under the Act, such an appeal being barred by the proviso to Sec. 30 (1).

An order of the Assistant Commissioner rejecting an appeal against an assessment under Sec. 23 (4) as not maintainable is an order within the meaning of Sec. 31, the question of law arising thereon for reference under Sec. 66 being whether or not the facts found amount in law to a default by the assessee justifying the assessment under Sec. 23 (4) and the application of the proviso to Sec. 30(1). On such a reference the question whether the assessee was liable to assessment under the Act cannot be raised before the High Court.

Case [Miscellaneous Judicial Case No. 90 of 1929] stated under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner or Income-tax, Bihar and Orissa in compliance with the order of the High Court.

CASE.

Kuarji Anand, hereinafter termed "the assessee" is a contractor who executes building contracts in certain of the Orissa Feudatory States. His home is in Cutch outside British India. The contracts are entered into with the Agency Engineer, Orissa Feudatory States, whose office is at Sambalpur in British India, In past years he had always been assessed to income-tax in respect of his profits from the contracts, but had uniformly objected on the ground that the profits did not accrue in British India and were not assessable to income-tax in British India. In connection with his assessment for the year of assessment 1927-28 the Income-tax Officer, Singhbhum-Sambalpur, served upon him a notice under section 22 (2) of the Indian Income-tax Act (XI of 1922) to make return of his income of the previous year. He sent back the form of return completely blank, with a petition denying liability to assessment to Indian income-tax. Notice under section 22 (4) was thereupon issued by the Income-tax Officer calling for complete accounts of business and of investments. The assessee replied by petition reiterating that

all his business was outside British India, and that no income accrued to him at all in British India and undertaking to furnish proof on his next visit to Sambalpur. The case having accordingly been adjourned, he subsequently appeared before the Income-tax Officer, but produced neither any proof of his contentions nor his books of account. Since, therefore, he had failed to comply with the terms of the notices under sections 22 (2) and 22 (4) the Income-tax Officer proceeded to make an assessment under section 23 (4) to the best of his judgment. He found that the assessee had house property at Sambalpur; and that the profits of his contract business accrued and were invested in British India. The finding that the profits were invested in British India was by deduction from the fact that the books of two of the assessees of his (Singhbhum-Sambalpur) Circle showed payments of interest to the assessee. He therefore made assessment on income from house property, interest and profits of contracts in the Bamra, Athmalik and Patna States. The assessee had contended that the contracts in the Patna States were undertaken solely by his nephew Madhavji Deoraj son of his deceased brother Deoraj Anand, but the Income-tax Officer held that the business in the Patna States really belonged to the assessee, who, to avoid taxation, had made it over in name only to his nephew.

The assessee appealed to the Assistant Commissioner on the merits of the assessment, and, simultaneously, petitioned the Income-tax Officer under section 27. The Income-tax Officer rejected the petition under section 27. There was no appeal against his decision. Subsequently to that rejection the Assistant Commissioner proceeded to the hearing of the appeal on the merits. He held that the assessee had been rightly assessed under section 23 (4), and also that he was assessable. The assessee thereupon filed an application before the Commissioner under sections 66 (2) and 33. My predecessor, after hearing the assessee, found that the Income-tax Officer had rightly made the assessment under sub-section (4) of section 23. He also held that the order in appeal passed by the Assistant Commissioner was without jurisdiction for the reason that the Assistant Commissioner was debarred by the proviso to sub-section (1) of section 30 of the Act from entertaining an appeal on the merits against an assessment under section 23 (4). On this finding he refused to draw up a statement of the case under section 66 (2) for submission to the Hon'ble High Court, but proceeded to examine the contentions of the assessee under section 33, and after examination and hearing the assessee disallowed them. I omit reference to the facts found by him and his conclusions thereon for the reason that the Hon'ble Court have ordered me to ascertain the facts myself, after re-hearing the assessee. It may, however, be noted that, on the ground that the assessee was joint with the nephew he altered the status of the assessee from that of an individual to that of a Hindu undivided family.

2. The assessee having applied to the Hon'ble High Court under section 66 (3) the Hon'ble Court ordered me to refer the following questions:—

(1) Whether a person who has been assessed under section 23 (4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act, or whether the proviso to section 30 clause (1) is a bar to the appeal?

(2) Whether on the facts of the present case the assessee is liable to be assessed under the Act?

They further gave me direction to ascertain the facts after hearing the assessee fresh. I have heard the learned Counsel for the assessee and considered the additional evidence which he tendered on behalf of the assessee. No offer to produce books was made.

3. My opinion on question (1) is as follows:—

There is no inherent right of appeal, but such right must be given by statute. The proviso to sub-section (1) of section 30 of the Indian Income-tax Act bars unequivocally an appeal against an assessment made under sub-section (4) of section 23. The remedy provided in the Act in cases of assessment under section 23 (4) is an application under section 27, and there is an appeal against an order under that section to the Assistant Commissioner. If, as in the present case, an appeal on the merits is put in, the duty of the Assistant Commissioner is to consider whether the Income-tax Officer applied his mind to the relevant questions in making the assessment under section 23 (4), and if he finds that the Income-tax Officer did not so apply his mind, then he should entertain the appeal, his jurisdiction to do so being derived from the fact that an assessment so made was not an assessment under section 23 (4) at all. In the present case, however, the Income-tax Officer had both applied his mind carefully to the relevant questions and the Assistant Commissioner himself found that the assessment was rightly made under section 23 (4). The Assistant Commissioner had therefore no jurisdiction to entertain the appeal as filed. Nor can there be any doubt that the assessment was rightly made under section 23 (4). There were strong grounds for believing that the assessee was assessable, and he had always been assessed in past years. The Income-tax Officer had therefore clear justification to issue a notice under section 22 (2). The assessee admittedly failed to comply with that notice, and admittedly failed to comply with a subsequent notice under section 22 (4). For these reasons my opinion is that the answer to the first part of question (1) is in the negative, and the answer to the second part is in the affirmative.

4. The facts in regard to question (2) and my opinion on the question are given below:—

The assessee was assessed on income from house property, interest, and on the profits of his contract business. The answer to question (2) therefore involves the determination of three points:—

(a) Whether the assessee owns house property in British India?

(b) Whether interest accrues to him in British India? and

(c) Whether the profits of the contract business accrue or arise in British India?

In regard to (a) house property, the facts are that from the financial year 1919-20 to the year 1923-24 premises No. 84, Gurupara Ward, in the Sambalpur Municipality, were recorded in the Registers of the Municipality as both owned and occupied by Deoraj Anand, brother of the assessee, who deceased in or about the year 1923. In the year 1924-25 the premises stood in the name of Deoraj Daya as owner, while the name of the occupier was set down as Madhavji Deoraj, nephew of the assessee. The entries of the year 1925-26 and 1926-27 were similar. In 1927-28 and in 1928-29 the assessee was recorded as both owner and occupier, whereas in 1929-30 Madhovji Deoraj was entered as owner and the assessee as the occupier.

Now the previous year with which we are concerned may be taken as the financial year 1926-27, although, in default of production of books and submission of return, it is not known what account period is followed by the assessee. The assessee submits that all the above entries were in error, except the entries from the year 1919-20 to the year 1923-24. He explains that Deoraj Daya was an outsider put in as owner by mistake of the Municipal authorities, who on the objection of Deoraj Daya, had inserted the name of the assessee, until Madhovji, the nephew, petitioned to be entered as owner. No proof of this was adduced. It seems to me unlikely that the entries for the three years 1924-25 to 1926-27 were really in the name of an outsider. The owner of a house is responsible for the payment of Municipal dues and it cannot reasonably be supposed that an outsider paid the house-tax for those three years. It is more probable that the name Deoraj Daya as entered in the Municipal Registers was simply a clerical error for Deoraj Anand, and that communications of bills from the Municipality in respect of the premises were successfully delivered under that name at the premises in question, and accepted or paid either by the assessee or by his nephew. In a past year I find from the record that the assessee maintained that the house belonged to his nephew to whom he paid a monthly rent of Rs. 15. To me, however, the most reasonable conclusion from the facts in regard to these entries appears to be that the assessee and his nephews are joint, or at least, were joint up to and including the previous year, and that they took no care whether the entries in the Municipal Registers were in the name of the one or the other.

It remains to be seen whether there is any other evidence of jointness. The assessee, though he declares that the contracts in the Patna State were solely undertaken and executed by his nephew, admitted before my predecessor frequent visits to the Patna State for the purpose of supervising his nephew's business there. Unless the business is joint, there would be no reason for any such visits of supervision. In the previous year, moreover, the nephew was only 24 years old. On the other hand a letter from the Agency Engineer was produced before me, in which the Engineer made reference to works which Madhovji Deoraj had been since 1923-24 executing in the State of Patna on his own account. An affidavit sworn by the nephew was filed before me which was to the effect that he had been separated from the assessee, his uncle, for the last 7 or 8 years, partition of the joint family having been effected between the assessee and the late Deoraj Anand, brother of the assessee, during the life-time of Deoraj Anand. The affidavit conflicts with a statement made on oath by the assessee before the Income-tax Officer on the 8th January 1926, in which the assessee declared that he and his nephew were members of a joint family. The deposition was signed by the assessee himself in token of its correctness. Moreover, I find from the record that the assessee's books for the financial year 1922-23, (there is no record of the exact accounting period) examined on 13-3-'24, showed personal account in the names of Deoraj Anand and Madhovji Deoraj containing items of personal expenses incurred by both, a proof that the parties were then joint, and Deoraj died soon after the year in question. There can therefore be no doubt that the affidavit is incorrect, a proof that the evidence tendered both by the assessee and his nephew must be received with caution. Without the evidence of the assessee's books, which he has not produced, it is difficult to be certain whether the assessee and his nephew have now separated or are still joint, but, on the facts at present before me, I must hold that the most reasonable conclusion is that they are joint, or at least were joint in the previous year, and that the assessee is liable

to be assessed as a Hindu undivided family under the Indian Income-tax Act in respect of the said house property.

5. In regard to (b), interest accruing in British India, the assessee avers that he has not put out at interest any other sum, but only the loans to the two firms in whose books the Income-tax Officer discovered payment of interest to him. An affidavit sworn by the assessee to the same effect was also put in before me. The names of the two firms in question are Pannalal Ramkissen of Sambalpur and Khubchand Bansidhar of Bargarh. The former firm paid a sum of Rs. 278-10-6 and the latter firm a sum of Rs. 225 as interest to the assessee in the previous year. Affidavits were also put in before me sworn by Ramkissen, proprietor of the firm of Pannalal Ramkissen, and by Sagarmal, one of the proprietors of the firm of Khubchand Bansidhar, to the effect that the respective firms contracted the respective loans in the State of Bolangir outside British India and that the interest is paid and was in the previous year paid to the assessee at Bolangir. The assessee also swore an affidavit supporting the above two affidavits. In consequence of this fresh evidence I had an enquiry made by the Income-tax Officer, who examined the books of the two firms in question. Neither firm have or had any business at Bolangir. It is therefore extremely unlikely that either loan was contracted at Bolangir. In fact it was expressly stated to the Income-tax Officer by the representative of the firm of Khubchand Bansidhar who appeared before him, that the loan to that firm was negotiated through the agency of a third party resident in Sambalpur. Of the sum of Rs. 278-10-6 shown as the assessee's credit in the books of Pannalal Ramkissen Rs. 173-5-3 was paid in cash through a member of the firm of Sriram Ramgopal of Bolangir, who, as was explained to the Income-tax Officer by the representative of Messrs. Pannalal Ramkissen came to Sambalpur with a letter of authority from the assessee, and received the money at Sambalpur. As regards the payment of Rs. 225 by Messrs. Khubchand Bansidhar, this amount was paid in cash. No evidence was put in to show where the money was paid, but it was probably paid at Sambalpur in British India which place is frequently visited by the assessee and at which the firm has its chief place of business. It is extremely unlikely that the firm would send a man to Bolangir to make payment of interest. Such a course of action would be extraordinary according to my experience. On this evidence, therefore, there can be no doubt that the affidavits are untrustworthy, and that the sums of interest in question accrued and were received in British India. It is moreover *a priori* improbable, especially in view of the untrustworthiness of the assessee's statements that these two sums are the only sums lent out at interest by the assessee within British India. I therefore find that interest accrues to and is received by the assessee in British India.

6. In regard to (c) the contract business, the facts ascertained from a letter from the Agency Engineer to the assessee filed before me, are that the actual work of construction is carried out outside British India, the principal contracting parties being the States themselves. For convenience several of the States have joined together and maintain an office and a joint Engineer, called "the Agency Engineer" in Sambalpur, within British India, which place is a convenient centre of operations. The Agency Engineer gives out all contracts on behalf of the States, supervises their execution, and issues cheques after being satisfied of the proper completion of the works, which cheques are payable at the State Treasuries. The cheques are unnegotiable payment orders on the respective States' Treasuries. The learned counsel for the assessee maintained that the business was neither carried on

in British India nor with British India. Here again the difficulty is that the assessee has not produced his books, without which it is impossible to be sure what part of the business is carried on in British India and what part outside it.

From the evidence at present before me, it seems to me, that, as the contracts are made and given out at Sambalpur, and supervised and controlled from Sambalpur, which is in British India, the most important part of the business is conducted in Sambalpur, which may fairly be said to be the headquarters of the business, and the centre from which it is directed. The contracts in different years are carried out at different places, sometimes in one State and sometimes in another. Sambalpur is therefore the only settled business centre. Again materials and stores must be obtained by rail delivery at Sambalpur, and all arrangements with sub-contractors, if any, made there. To satisfy the Agency Engineer that the various works have been carried out according to specification and contract is the most important part of the assessee's business. Doubtless the Agency Engineer does not frequently inspect all the buildings himself, but relies on the reports of his overseers in the case of many of them as to progress, and proper completion, materials used, workmanship, etc. So that the assessee has to secure the satisfaction of the Engineer on the basis of these reports, and much dealing in British India by way of business is necessitated thereby and an office in British India. It is evidently for business reasons that house is retained in Sambalpur. Even if the house belongs to the nephew and the nephew is separated from the assessee, it is admitted that the assessee frequently resided in the house in and about the previous year, and there would have been no necessity for such residence except on account of business in connection with the contracts.

For these reasons my opinion is that on the facts before me, the most reasonable conclusion is that the business was done in British India in the previous year and the profits accrued and were assessable in British India.

7. My opinion, therefore, is that the answer to question (2) is in the affirmative.

Manohar Lal and *S. N. Banerjee*, for the Assessee.

C. M. Agarwala, for the Crown.

Order of reference to Full Bench.

COURTNEY TERRELL C J. & DHAVLE J.:—The points raised in this reference under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) are of such importance—having regard especially to the view taken by a Full Bench of the Lahore High Court in *Duni Chand* v. *Commissioner of Income-tax, Punjab*[1] which was apparently not accepted by a Division Bench of this Court when on the 18th November 1929 it directed the Income-tax Commissioner to state a case—that we consider it very desirable that the case should be referred for decision by a Full Bench.

Let the papers be accordingly laid before the Chief Justice under Ch. V Rule I of the Patna High Court Rules.

(1) 4 I. T. C. 33.

JUDGMENT.

COURTNEY TERRELL, C. J.:—This is a case stated by the Commissioner of Income-tax at the direction of the Court on the application of the assessee. The material facts which have given rise to the case may be shortly set forth. The assessee is a resident of Cutch and he carries out engineering work for the Feudatory States of Orissa. The circumstances in which this work is carried on need not be mentioned in detail. It is sufficient to note that the assessee contends that the contracts are made and the work is paid for in circumstances, as found by the Income-tax Officer and the Assistant Commissioner, such that the income in respect of his business cannot be deemed in law to have been received in British India and so is not liable to taxation under the Income-tax Act.

The assessee received a notice from the Income-tax Officer under section 22 (2) requiring him to make a return in the prescribed form and verified in the prescribed manner setting forth his total income during the previous year, that is for 1926-27. He wrote a letter to the Income-tax Officer in the following terms:—

Sir,—I have already intimated to you that I do not reside at Sambalpur, i.e., in British India and all my business is done in the Native States and no part of my income, gain or profit, accrues or arises in British India. The provisions of the Indian Income-tax Act do not apply to my income.

I would submit my proof, in support of my statement herein above made as soon as I come down to Sambalpur in the course of a month. Yours faithfully, Sd./- Kunwarji Ananda, Contractor, 10-10-'27.

He did not fill up the form provided by the Act nor did he verify such form in the prescribed manner. An attempt was made to argue that the letter written by the assessee was a fulfilment of the requirement to make a return but this contention cannot seriously be relied upon and it must be taken that he failed to make a return. The Income-tax Officer also served a notice upon him under section 22 (4) requiring him to produce certain accounts. He failed also to comply with this notice. Thereupon the Income-tax Officer under section 23 (4) made a summary assessment to the best of his judgment.

The assessee thereupon went on appeal to the Assistant Commissioner who decided that as the assessee had not filed a return of his income and had not in a petition lodged by him under section 27 given good and sufficient reasons for not filing such return, the Income-tax Officer was justified in making his assessment under section 23 (4) of the Act and in rejecting the petition filed under section 27. The Assistant Commissioner in his decision went further than the circumstances required and dealt with the contention of the assessee that the income in respect of which he was assessed accrued and was received outside British India, and purported to decide that the view of the Income-tax Officer was right and that the income in question was assessable under the Indian Income-tax Act.

The assessee then went to the Commissioner, under section 33, for relief under the Commissioner's discretionary powers, and also under section 66 (2), requesting him to refer to the High Court the question of law which he said arose under the Assistant Commissioner's order, namely as to whether on the Assistant Commissioner's findings of fact the income could be deemed in law to have been received in British India. The Commissioner

refused to state a case holding that the assessment had been rightly made under section 23 (4) and that the Assistant Commissioner ought to have dealt with this latter point only and ought to have rejected the appeal *in limine*.

The assessee then came to the High Court, the application being heard by two learned Judges who directed the Commissioner to state a case upon the following two points:—(1) Whether a person who has been assessed under section 23 (4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act, or whether the proviso to section 30, clause (1) is a bar to the appeal; and, (2) Whether on the facts of the present case the assessee is liable to be assessed under the Act? The Commissioner has accordingly stated a case and it was heard in the first instance by Mr. Justice Dhavle and myself and we thought it desirable that the matter should be re-heard by a full bench.

The assessee contends that he is only obliged by section 22 (2) of the Act to furnish a return of his "total income". He refers to the definition of "total income" contained in section 2 (15) which is as follows:—"Total income means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16." The assessee's contention is that he is bound to furnish a return only of such income as is liable to assessment under the Act and therefore if he has no such income he need make no return and no part of the Act including section 23 (4) and section 30 (1) is applicable to him or to such income. Section 30 (1) of the Act which is, in my opinion, conclusive against this contention, is as follows:—"Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 25-A or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order: Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27."

It was admitted on behalf of the assessee by Mr. Manohar Lal that if the assessee by his neglect to make a return or to fulfil the obligation of furnishing accounts or evidence under section 23 incurs the liability to a summary assessment he cannot question the amount or rate of the assessment but he contends that he is entitled to have the opinion of the Court upon the question of whether or not, upon the facts found, he has incurred such liability. With this contention I will deal later, but Mr. Manohar Lal further argues that since the income in respect of which the assessment is made is, according to his contention, not liable to any taxation under the Act he is entitled to come to us to have it decided as a point of law whether section 30 (1) including the proviso has any application to him or to his income. He agrees that should the decision be against him on this point, then the amount or rate of the assessment so summarily made cannot be questioned.

Section 30 (1) gives a right of appeal to the Assistant Commissioner against the decision of the Income-tax Officer whether upon the question of the amount or rate of the assessment or upon the question of liability to assessment under the Act, and it is clear that the assessment may be ques-

tioned on either of these grounds. But the effect of the proviso is, in my opinion, to take away the right of appeal whether as to the amount or rate of assessment or whether as to the question of liability to assessment, in any case in which the assessment is made under sub-section (4) of section 23. Now sub-section (4) of section 23 expressly states that the Income-tax Officer may make a summary assessment if the assessee fails to make a return under sub-section (2) of section 22 (as he has in fact failed in this case) or fails to comply with the notice under section 22 (4) (as the assessee has in fact also failed).

The assessee has therefore brought himself within the terms of the proviso to section 30 (1) and as I have said no appeal lies in respect of an assessment whether as to the amount or rate or whether as to the question of liability to taxation. This view of the matter is not unreasonable. It must be remembered that the scheme of the Act provides that if the Income-tax Officer forms the opinion that any person has an income taxable under the Act he may serve upon him a notice requiring a return. It is open to that person to make a return in the prescribed manner and accompanied by the required verification and to state, if such be the fact that he has no income to which the Act applies. If made in the required form and verified in the required form this is a good and sufficient return. The Income-tax Officer may, however, demand to see any books of account specified by him whether or not these books of account do or do not, in the opinion of the assessee, refer to the assessee's taxable income. Indeed if the assessee truly says he has no taxable income it will follow that such books as he may keep cannot have any reference to a taxable income. Nevertheless, the Income-tax Officer is, under section 22 (4) entitled to see the books specified by him in the notice. Furthermore, if required by the Income-tax Officer, under section 23 (2) to do so, the assessee must attend at the office and produce any evidence upon which he may rely in support of the return made by him. Failure to make a return in the prescribed form or failure to comply with the notice to produce books of account as specified by the Income-tax Officer or to produce evidence relied upon by the assessee is punished by the exposure of the assessee to summary assessment without right of appeal.

The assessee in this case has failed to make a return and being deprived of his right of appeal to the Assistant Commissioner he cannot question the summary assessment either on the ground of errors in the amount or rate or on the question of liability. But a further question of some importance has been fully argued and with it I propose to deal although it does not directly arise having regard to the view I take of the construction of section 30 (1). It is contended on behalf of the Department that, if on appeal to the Assistant Commissioner, it is found that the order of the Income-tax Officer states that the assessment has been made under section 23 (4), the Assistant Commissioner is bound forthwith and without going further into the matter to reject the appeal *in limine*. It is contended, on the other hand, by the assessee, that the Assistant Commissioner may examine the matter to see whether or not in fact the assessee has failed to make a return or failed to comply with the notice so as to render him liable to summary assessment. It is conceded by the assessee that if the Assistant Commissioner finds that the assessee is in default in these matters and has therefore incurred the punishment contemplated by the proviso to section 30 (1) he must dismiss the appeal without inquiry as to the amount or rate assessed or the liability to assessment. It is contended on behalf of the assessee that a decision of the Assistant Commissioner on this preliminary

point of fact is an appellate order under section 31 and therefore under section 66 (2) the Commissioner is bound on the requirement of the assessee to refer to the High Court the question of law whether on the statement of facts by the Assistant Commissioner the assessee has or has not incurred the penalties set forth in the proviso to section 30 (1). It is true that the assessee has attempted to strain this argument beyond its legitimate scope. He has contended that he has made no default in making any return because there was no obligation upon him to make a return save in respect of income to which he was liable to assessment. With that argument I have already dealt, holding that the question of liability to assessment is barred to the assessee, but having regard to the contention of the Crown, it is nevertheless most important to see whether or not an assessee is entitled to come to this Court upon the limited question as to whether he has so conducted himself as to render him liable in law to the penalty imposed by the proviso to section 30 (1).

The argument for the Department amounts to saying that the question of whether or not the conduct of the assessee (as found in fact by the Income-tax Officer or the Assistant Commissioner) is such conduct as will render the assessee liable to the penalty set forth in the proviso to section 30 (1), can never in any circumstance be brought before the Court, save perhaps by the doubtful process of an independent suit by the assessee. Whatever the technical legal considerations the general duty of the Court to stand between the subject and the Crown in the matter of illegal taxation forces me to regard this contention as very unattractive, and it is, in my opinion, unsound. It is undoubtedly the duty of the Assistant Commissioner when the order of the Income-tax Officer comes before him on appeal to decide whether or not he is precluded by the Act from going into the amount or rate of the assessment or the liability of the assessee, and if he is so precluded he must reject the appeal. In so rejecting the appeal, he is, in my opinion under section 31, "disposing of an appeal" and such disposal is "a proceeding in connection with an assessment under this Act." It is the duty of the Assistant Commissioner, if he disposes of an appeal in this manner, to refrain from going into the irrelevant question of the amount or rate of the assessment or the liability of the assessee but a question of law may certainly arise in connection with such disposal of an appeal which will be limited to the point as to whether, on the facts found by the Assistant Commissioner, the conduct of the assessee amounted to a refusal to perform the obligations upon him imposed by the Act.

This view of the matter was indicated in the judgment of the learned Chief Justice of Lahore in the case of *Duni Chand* v. *The Commissioner of Income-tax, Punjab.*[1] In that case it was decided that an assessee who has been summarily assessed under section 23 (4) is prevented by reason of the proviso to section 30 (1) from appealing to the Assistant Commissioner on the ground that he was not liable to assessment under the Act and in this matter I respectfully agree with the judgment of the Punjab High Court. The learned Chief Justice said: "The law punishes a person who does not comply with a requisition by the Income-tax Officer by depriving him of his right of appeal. But the appellate authority must before denying him the right of appeal be satisfied that he had really incurred the penalty prescribed by the law, and that the Income-tax Officer had acted legally in assessing him under section 23 (4) of the Act. The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal; it must be shown that the circumstances of the case bring

(1) 4 I. T. C. 33.

it within the scope of that sub-section. When the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely, under that sub-section, he must stay his hands and decline to adjudicate upon the merits of the appeal on the short ground that the proviso to section 30 (1) bars an appeal in such a case." With this view also I respectfully agree. If the Income-tax Officer wishes to justify his summary assessment under section 22 (4) he must set forth the facts which, in his opinion entitled him to make such summary assessment. The assessee is entitled to go to the Assistant Commissioner and if the Assistant Commissioner finds that the facts so found are established and that as established they amount in law to a default by the assessee justifying the application of the proviso he should refuse to go into the merits of the assessment. But his decision on this point and his rejection of the appeal are a proceeding in connection with an assessment and it is the duty of the Commissioner, if required by the assessee, to state a case raising the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the assessee within the ambit of the proviso to section 30 (1).

To answer now the question submitted to us I would reply that a person who has been assessed under section 23 (4) is not entitled to prefer an appeal to the Assistant Commissioner on the ground of liability to assessment and that upon this point the proviso to section 30 (1) is a bar to the appeal. The second question whether on the facts of the present case the assessee is liable to be assessed under the Act really raises the question of the liability to assessment and in this matter as I have said the contentions of the assessee cannot be heard and should not have been heard by the Assistant Commissioner. If the assessee should on a future occasion desire to raise this matter he must first so conduct himself in making his return and in subsequent proceedings that he does not, as he has in this case, shut out such matters from consideration. It will then be time to examine into the merits of the question.

The assessee has failed in his contentions and has failed through his own obstinate refusal to follow the requirements of the Act. He must pay to the Department 20 gold mohars by way of the costs of this reference.

WORT, J. :—This is a case stated by the Commissioner of Income-tax under the direction of this Court. The questions which stated by the Judges arose were: (1) Whether a person who has been assessed under section 23 (4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act, or whether the proviso to section 30 (1) is a bar to the appeal; and (2) Whether on the facts of the present case the assessee is liable to be assessed under the Act?

According to the case stated by the Commissioner, Kunwarji Ananda, who is the assessee, is a contractor whose business is to execute building contracts in certain of the Orissa Feudatory States. His home is in Cutch outside British India. There were contracts which were entered into with an Agency Engineer of the Orissa Feudatory States whose office is in British India at Sambalpur.

The year of assessment in dispute is 1927-28 and for that year the Income-tax Officer of Singhbhum-Sambalpur served upon him a notice under section 22 of the Income-tax Act to make a return of his income of the previous year. He returned the form blank with a covering letter or petition stating that he was under no liability to be assessed under the Income-tax Act.

There was certain correspondence and the assessee continued to deny his liability. Thereupon the Income-tax Officer issued a notice under section 22 (4) calling upon him to furnish accounts of his business and of his investments. The assessee appears to have replied by a petition repeating the statement that he was not liable to assessment as his business was outside British India, and that no income accrued to him in British India, undertaking at the same time to furnish proof on his next visit to Sambalpur. This was by a letter dated the 10th October 1927. The assessee subsequently appeared before the Income-tax Officer but produced neither proof of his contentions, nor any books of account. Having therefore failed to comply with the demand to make a return and with the notice under section 22 (4) the Income-tax Officer proceeded to assess him to the best of his judgment under section 23 (4). From information which he received the Income-tax Officer found that the assessee had house property at Sambalpur and that the profits of his contract business accrued and were invested in British India.

According to the case stated by the Commissioner the fact that the profits were invested in British India was proved to his satisfaction from books of account of two assessees who had been assessed by the Officer.

As a result of this assessment there was an appeal by the assessee to the Assistant Commissioner and at the same time there was a petition under section 27 of the Act to the Income-tax Officer. This petition was rejected and there was no appeal against this decision.

The appeal before the Assistant Commissioner then came on for hearing. He decided that the assessee had been properly assessed under section 23 (4). He went into the merits of the case and came to the conclusion that he was properly assessed otherwise, that is to say, that apart from any summary assessment under section 23 (4) the facts before the Assistant Commissioner were such as to show the assessee as being liable. The finding that he had been correctly and summarily assessed came at the end of the order of the Assistant Commissioner dated the 5th May 1928, and he also found that the Income-tax Officer was right in rejecting the petition to reopen the assessment under section 27. There was an application then to the Commissioner in revision. The application in revision was accompanied by an application to state a case to the High Court under section 66 (2). The Commissioner decided that he had been properly assessed under section 23 (4); but for the purpose of the application in revision he examined the assessee's contention as to the merits and decided against him. In the course of his order he came to the conclusion that the Assistant Commissioner should have rejected the appeal "*in limine*" instead of going into the merits, as under the proviso to section 30 (1) no appeal lay in the case of a "summary" assessment under section 23 (4).

The first point which is made is by way of a preliminary objection on the part of the Crown. It is argued that this Court has no jurisdiction to entertain the case stated and that we must dismiss it forthwith. It is argued that as there is no appeal in the case of a "summary" assessment by reason of the proviso to section 30 (1) the order of the Assistant Commissioner was not an order under section 31; that it is only in the case of an order under section 31 that the assessee is entitled to call upon the Commissioner to state a case to the High Court—see section 66 sub-section (2)—and that only when there has been an order under section 31 has the High Court jurisdiction to call upon the Commissioner to state a case upon his refusal

to do so. I cannot accept this argument in its entirety as I am not prepared to hold that under sub-section (3) of section 66 the jurisdiction of the High Court is in any way limited; that is to say if the High Court is of the opinion that a point of law arises, the High Court may call upon the Commissioner to state a case thereon. Whether the High Court ought or ought not to use its discretion in favour of the assessee in any particular set of circumstances is another matter. Further the very argument of the assessee which is indicated by the first question which my learned brothers Das and James, JJ., decided is the point of law which on one view of the facts is stated to have arisen in this case, and if indeed such a question does arise it cannot be argued that the jurisdiction of the High Court is limited in ordering the Commissioner to state a case thereon.

It would appear that the argument of the Crown amounts to this that as the first question which is stated to have arisen in this case must be answered in favour of the Crown, therefore the High Court has no jurisdiction to order the Commissioner to state a case. If indeed in the result it be found that no question of law contemplated by section 66 arises but only a question of jurisdiction, the case, in my opinion, would have to be answered in favour of the Crown and to that extent the substance of the preliminary objection would have to be upheld and to that extent only could the preliminary objection succeed but as a mere preliminary objection to this Court's going into the matter in any degree I think it must fail.

The first argument of Mr. Manohar Lal on behalf of the assessee is correctly represented by the first question. In the course of the argument he agreed to this statement of the proposition. He says that "the jurisdiction to impose a 'summary' assessment depends not only upon the fact that a return has been made or not made as the case may be and the order under section 22 (4) has not been complied with but upon the assessee's liability in fact and in law to be otherwise assessed." He contends that on the facts that have been stated by the Commissioner the only inference which can be drawn is that the assessee has no income which is liable to assessment under the Act. That being so, no summary assessment could be made although he was in default both under sub-section (2) of section 22 and sub-section (4) of the same section.

Now it is necessary to examine the sections in order to ascertain what gives rise to what has been described as a "summary" assessment. Sub-section (2) of section 22 is the first section in this connection. Under that sub-section the Income-tax Officer who is of the opinion that the total income of any person is of such an amount (Rs. 2,000 under the Act) as to render him liable to income-tax must serve on that person a notice requiring him to furnish within such period a return in the prescribed form. The method of his arriving at a conclusion that his income is above a certain amount can be imagined. In most cases it is arrived at from the fact that the person upon whom the form is served is living in such a style that the inference to be drawn is that his income is in excess of that amount and that the person is within the jurisdiction of the Income-tax Officer is necessarily a condition precedent. In this case if it was necessary for the Income-tax Officer to have *prima facie* evidence, that would be found in the fact which has been stated in this case that the assessee resided from time to time in a house which was the property of the joint family of which he was a member. But I see nothing in the section which would disclose an obligation on the Income-tax Officer to establish this fact before serving a notice under the sub-section. That there is no method provided under the Act enabling the assessee to question the actions of the Income-tax Officer is clear.

The next section is sub-section (4) of section 23 which provides that if any other person fails to make a return under sub-section (2) of section 22 and fails to comply with the terms of the notice under sub-section (4) the Income-tax Officer shall make the assessment to the best of his judgment.

The assessee after such an assessment has a certain remedy with regard to this under section 27, that is to say he can show that he was prevented from making a return by sufficient cause or that he did not receive the notice under sub-section (4); the Income-tax Officer shall cancel the assessment and will proceed to make a fresh assessment under the main provisions of section 23. Indeed section 23 (4) appears to provide a penalty for not complying with the provisions of the Act and the orders of the Income-tax Officer thereunder. It is not seriously disputed that the assessee has made himself liable to a "summary" assessment.

I think that it must be conceded that the Income-tax Officer would not be entitled to assess a person whom he knew not to be assessable, as not having an assessable income. He is to assess "summarily" to the best of his judgment. That of course is not arbitrarily or illegally. This is however a question of jurisdiction and whether this Court is entitled to interfere by directing a case to be stated depends, it would appear, upon the provisions relating to appeals.

The legislature has placed in the hands of the Income-tax Officer the jurisdiction to form an opinion as to whether a person is a person assessable under section 22. It is not disputed that so far the decision of the Income-tax Officer is final. That he has an uncontrolled discretion to issue a notice under section 22 (4) is not disputed. At what stage then does the control of the Courts arise? To this the obvious answer is at the stage when an appeal is preferred to the Assistant Commissioner. Before that stage can be reached there is an assessment.

It is not argued seriously that the appellate officers or the High Court can control the action of the Income-tax Officer in assessing a person under section 23 (4). It is at this stage that the learned advocate is driven back to the argument that the proviso to section 30 (1) means that there is an appeal in the case of an assessment under section 23 (4) in spite of the clear words of the statute.

The assessee's main contention is that in spite of the proviso to sub-section (1) of section 30 he has an appeal to the Assistant Commissioner. The argument is based on the interpretation which he desires this Court to place upon the word "assessment" in the proviso to sub-section (2) of section 30. The sub-section itself reads: "Any assessee objecting to the amount or rate at which he is assessed under section 23 or 27, or denying his liability to be assessed under this Act may appeal." Two matters are referred to there, the first is the rate at which the assessee is assessed and the second is his liability in law to be assessed. The argument is that when you come to the proviso to the sub-section the word "assessment" only is used, and it is contended that what is meant by the use of the word is merely assessment as regards the amount, and that the proviso does not prohibit the assessee in the case of a "summary" assessment from appealing as regards his liability; that is to say although he cannot question the amount before the Assistant Commissioner he may question his liability in law to be assessed. When the Income-tax Officer or the Assistant Commissioner is dealing with an assessment under the Income-tax Act he has to apply his mind to two

main questions: the first is whether the assessee has any taxable income (this involves both questions of fact and law), the next matter he has to address himself to, when having satisfied himself that there is an income which under the law is liable to assessment, is what is the proper rate at which he should be assessed and it does not seem to me that it is possible to read the expression "assessment" in the proviso otherwise than in the sense which I have indicated in the foregoing statement. That is to say in exercising his best judgment under section 23 (4) the Income-tax Officer exercises it both as regards liability and as regards the amount. It cannot be assumed that the Income-tax Officer has acted arbitrarily or that it could be said that he was assessing the assessee to the best of his judgment if he deliberately assessed a person whom he knew to be not liable to assessment in law. In my judgment the word "assessment" in the proviso is used in the wider sense.

So far as the assessment of a person assessed after making a return and complying with such notices that are directed to him and an assessment made under section 23 (4) are concerned they differ in this respect only, that in the latter case the decision of the Income-tax Officer is final (apart from the revisional powers of the Commissioner and the jurisdiction under section 27) whereas the assessment in the former case is open to appeal. It will be seen that in order to argue that the assessee can question the "summary" assessment on the ground that he has no income liable in law to be taxed or that this Court is entitled to say that on the facts disclosed there is no taxable income, the assessee must rely almost entirely upon this argument as to his right to appeal to the Assistant Commissioner on a question of law. In my judgment there is nothing in the Act which gives him this right.

But there is another branch of the argument and that is that the Assistant Commissioner has made an order in this case under section 31 and therefore he is entitled to have the matter determined on a case stated. It will be seen that throughout the arguments which are advanced by the assessee the gravamen of his contentions is that this Court is bound to express its view on the question whether the true inference from the facts is that the assessee's income is an assessable one. It is true that the Assistant Commissioner has stated his view of the facts and the law but he has also stated that there is no appeal in a case of this kind. If the proviso to sub-section (1) of section 30 is to be construed in the way I have stated, then there was no such appeal, and the Commissioner was right in saying that the merits should not have been discussed. Does the fact that the Assistant Commissioner has discussed the merits, give the assessee rights which he would not otherwise have had? I do not think that can be so. If the assessee had no appeal there could be no order under section 31 excepting an order stating that no appeal lay. It is not such an order which is contemplated by section 66 and if it is not the Commissioner cannot be called upon to state a case as no question of law arises.

For these reasons I would answer the first question in the negative, or if put in its alternative form in the affirmative.

The further argument addressed to us on this point is this. It is said that this Court is not disposing of an ordinary action, that we are not entitled to say that the decision of a part of the case disposes of the whole and reliance is placed in this connection on section 66 (5) which provides: "The High Court upon the hearing of any such case shall decide the question of

law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded." It is argued that the expression "the question of law raised thereby" means such questions as this Court was of the opinion arose when the application was made by the assessee to order the Commissioner to state a case. I do not agree with that contention. Under the section (sub-section (2) of section 66) the Commissioner shall within sixty days of the receipt of such application draw up a statement of the case and refer it with his own opinion thereon to the High Court. That of course is the provision relating to a Commissioner stating a case on the application of the assessee but, in my judgment, the case stated by the order of the Court under sub-section (4) is no different in form than that stated under sub-section (2); in other words the jurisdiction of the Commissioner is to state the whole facts of the case and his opinion thereon. Although this Court was of the opinion that two questions arose the hands of the Court are not tied when it comes to hear the case argued as to what are the questions which in fact arose. Further I would hold that even assuming we are bound by the questions which are said to arise at the time of the application to order the Commissioner to state a case, if indeed the answer to one disposes of the whole case, we have no jurisdiction to proceed to decide the other questions which in such circumstances can only be of an academic value. In this case the assessee was rightly assessed under section 23 (4). That assessment depends upon the fact that a notice has been served upon the assessee requiring him to make a return. His failure to do so and his failure to comply with the notice under section 22 (4) does not depend upon his being otherwise liable to be taxed.

The further argument on this first point to which I should have referred was that a "summary" assessment cannot be made unless there is a non-compliance with the notice under section 22 (4) and the non-compliance with a notice under section 23 (2). This argument obviously fails by reason of the fact that three classes of cases are provided for in section 23 (4); one is the failure to make a return or fails to comply with the notice under sub-section (4) of section 22 or having made a return fails to comply with the notice under section 23 (2), and it cannot be said that there must be a failure in each of those cases before the jurisdiction arises in the Income-tax Officer to summarily assess the assessee. In my judgment the assessee was properly assessed and the first question therefore should be answered in favour of the Crown, the second question not arising.

KULWANT SAHAY, J.:—I agree with my Lord the Chief Justice in the answer he proposes to give to the first question formulated by the Division Bench of this Court in the order requiring the Commissioner to state a case under section 66. The proviso to sub-section (1) of section 30 bars an appeal in respect of an assesement made under sub-section (4) of section 23 or under that section read with section 27. This bar applies to an appeal not only as regards the amount or rate at which the assessment has been made, but also as regards the liability of the assessee to be assessed under the Act. It has been contended on behalf of the Crown that when an appeal is barred an order of the Assistant Commissioner dismissing the appeal on the ground of its being barred under the proviso to section 30 (1) is not an order passed under section 31 within the meaning of section 66 (2) of the Indian Income-tax Act. This contention I am unable to accept. An order holding that no appeal lies is an order disposing of an appeal within the meaning of section 31 and the question of law which can be referred to the High Court under section 66 against such an order is, whether upon the facts found the assessment was properly made under section 23 (4). In my opinion that is the

point of law which can be referred to the High Court under section 66 and the reference should be confined only to that point and to no other point. I am unable to accept the contention of Mr. Manohar Lal that when a reference to the High Court properly lies under section 66 then the question as to whether the assessee was liable to assessment under the Act can also be raised before the High Court. In my opinion this question cannot be raised inasmuch as an appeal on this point did not lie before the Assistant Commissioner under the proviso to section 30 (1). In this view of the case the second question referred to us does not arise and I refrain from giving any opinion on that question.

FAZL ALI, J.:—Besides the two questions which have been set out in the order of this Court dated the 18th November 1929 requiring the Commissioner of Income-tax to state a case, there arises a third question in this case, namely, whether the High Court has jurisdiction to act under section 66 where no appeal lies under the Income-tax Act at all against the assessment made by the Income-tax Officer. The learned Assistant Government Advocate who appears for the Crown relies on section 66 (2) which lays down that an assessee in respect of whom an order under section 31 or section 32 has been passed, may within a certain period of the date on which he is served with the notice of an order under section 31 or section 32, move the Assistant Commissioner to refer any question of law arising out of such an order or decision to the High Court. It is argued that the language of this sub-section clearly indicates that the assessee cannot move the Commissioner in those cases where no appeal lies and where therefore no order under section 31 or section 32 can be passed. There is no doubt that a good deal can be said in support of this view but on the whole it appears to me that it is based on a somewhat narrow construction of section 66 (2) and may in some case at least defeat the very object for which the section has been enacted. All that the sub-section requires is that there should be an order or a decision under section 31 or section 32 and the question of law which the assessee requires the Commissioner to refer to the High Court should arise out of such an order or decision. Now, what we find in this case is that an appeal was preferred to the Assistant Commissioner by the assessee whose contention was that although he had been summarily assessed under section 23 (4), he was not taxable under the Act at all and therefore he could not have been assessed in law under section 23 (4) or any other section of the Income-tax Act. The Assistant Commissioner did not summarily dismiss the appeal but fixed a date and place for hearing the assessee and after dealing with the point as to whether the assessee was liable to be taxed under the Act or not, confirmed the assessment on the ground that the assessment had been rightly made under section 23 (4). The question is whether this order or decision was or was not one under section 31.

The learned Assistant Government Advocate contends that once it is found that no appeal lay to the Assistant Commissioner, the order passed by that officer cannot be regarded as one passed under section 31. Now section 31 provides that the Assistant Commissioner may in disposing of the appeal confirm, reduce, enhance or annul the assessment or may set it aside and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit. In this case the Assistant Commissioner passed an order which is at least in form an order under section 31. In passing the order the Assistant Commissioner also purported to act as the ordinary appellate authority and as far as I am aware there is no section in the Income-tax Act except section 31 under which the order could have been passed. It appears to me, therefore, that

the moment such an order is produced before the Commissioner of Income-tax, the assessee is entitled to ask him if he so wishes to refer such question of law as arise out of it to the High Court under section 66 (2). It is to be remembered that section 66 (2) does not say expressly that the remedy provided by the section will not be available where the assessment is not appealable; but all that it requires is that there should be an order or decision under section 31 or section 32. Under section 31, the Assistant Commissioner has the power to allow the appeal as well as to reject it and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not passed under section 31. It is true that the majority of cases where an assessee has recourse to section 66 (2) are those where an appeal lies; but there may be certain cases where the assessee honestly thinks that an appeal lies and yet it is decided by the appellate authority that the appeal does not lie. I do not see why in such cases the assessee should be debarred from bringing up to the High Court at least the limited question as to whether an appeal did or did not lie in the circumstances of the case.

It is true that there will not be any such cases in actual practice but the case of *Pitta Ramaswamiah* v. *The Commissioner of Income-tax*,[2] may illustrate one type of case where the question of whether an appeal lies or does not lie may be a debatable one. In that case the assessee although he was called upon to substantiate his return did not do so and said that the officer might assess him on such materials as he might find. The Officer thereupon proceeded to estimate the income which turned out to be much larger than what the assessee had stated and in making the assessment he used the words "to the best of my judgment" which occur in section 23 (4). A question arose as to whether it was an assessment under section 23 (4) or not but it was decided that it was really an assessment under section 23 (3) and an appeal lay to the Assistant Commissioner. Curiously enough in this case it was the assessee who contended that no appeal lay to the Assistant Commissioner, because it being a case of gross mis-statement of income, the assessee had been fined and he therefore attempted to show that the proceedings before an appelate Income-tax authority were *quoram non judice*. The decision nevertheless shows that there may arise in actual practice cases where it may be a debatable question whether a certain assessment has or has not been made under section 23 (4). The view that I am inclined to take is also indirectly supported by the decision of the Lahore High Court in *Duni Chand* v. *The Commissioner of Income-tax*.[3] In that case there was an assessment under section 23 (4) and it was finally decided that no appeal lay to the Assistant Commissioner of Income-tax. Nevertheless the matter was brought up to the High Court under section 66 and no one raised the question that the provisions of section 66 were not applicable because the assessment was not appealable. In *A. R. A. N. Chettiyar Firm* v. *Commissioner of Income-tax Burma*,[4] a preliminary point was raised on behalf of the Crown that no appeal lay and so the High Court had no jurisdiction to deal with the case under section 66, but this did not prevent the learned Judges of the Rangoon High Court from dealing with the points which arose in the reference.

The learned Counsel for the petitioner also relied on a number of cases which support the principle that where an appeal is preferred to a Court which is the proper appellate authority, the order of such a Court would be regarded as the order of an appeallate Court even though no ap-

(2) 2 I. T. C. 196.
(3) 4 I. T. C. 33.
(4) 2 I. T. C. 477.

peal in fact lay. One of such cases is *Wazir Mahton* v. *Lulit Singh*,[5] where while considering the meaning of paragraph 2 of Article 179 of the second schedule of Act XV of 1877, the learned judges of the Calcutta High Court said:—"Where there has been an appeal, three years are to be counted from the date of the final decree or order of the appellate Court. There is no question that in this case there was an appeal; although both the appellate Courts held that no appeal would lie. The case therefore comes within these words of Article 179, namely "where there has been appeal". The next question is whether there is any decree or order of the appellate Court. There were orders no doubt of the Court to which appeals were preferred rejecting the appeals on the ground that no appeal would lie. The words "appellate Court" in our opinion here means the Court or Courts to which the appeals mentioned in the section have been preferred. The meaning of this clause therefore in our opinion is that where there has been an appeal, the period is to run from the date when the court to which that appeal has been preferred passes an order disposing of the appeal". That case, it is true, was decided with reference to a wholly different Statute but the reasoning which was adopted there is, in my opinion, also applicable to this case and I think that where an appeal has been actually preferred to the appellate authority and where it has been disposed of by such authority, an order passed in such a proceeding may without straining the actual words of the section be regarded as order under section 31 or section 32 as the case may be. It is said that to take this view would be to invite the assessees to prefer appeals in those cases also where no appeal manifestly lies, merely as an excuse for taking the case up to the High Court. This, however, need not deter us from construing the section in the manner in which it ought to be construed, because even if an assessee does attempt to take the case up to the High Court on frivolous grounds, he will be generally limited only to the question as to whether an appeal does or does not lie in the case and will have always to reckon on being saddled with costs in the event of failure.

The next question to be determined in this reference has been formulated thus: Whether a person who has been assessed under section 23 (4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act or whether the proviso to section 30 (1) is a bar to the appeal. The answer to the latter part of the question was given in the affirmative by a Full Bench of the Lahore High Court composed of five Judges in *Duni Chand* v. *The Commissioner of Income-tax*,[6] and I fully agree with the view expressed in that case. The first part of sub-section (1) makes it quite clear that it is open to an assessee to attack the assessment on three grounds, namely (1) as to the amount; (2) as to the rate at which he is assessed and (3) on the ground that he is not liable to be assessed under the Income-tax Act. The proviso to section 30 (1) makes it equally clear that where an assessment has been made under section 23 (4) it cannot be attacked on any of those three grounds whatsoever. In other words, the assessee can neither impugn the correctness of the amount on which he is assessed or the rate at which he is assessed nor can he contend that he is not liable to be assessed under the Act at all. This drastic provision has apparently been made to induce the assessees to co-operate with the Income-tax authorities and to deter them from withholding such evidence as they can produce under section 22 (4) or 23 (2).

The learned Counsel for the petitioner contends that the provison will not apply to those cases where an assessment has been merely labelled as one

(5) I. L. R. 9 Cal. 100.

(6) 4 I. T. C. 33.

under section 23 (4) but where in law the assessee could not be taxed at all under that provision or any other provision of the Act, because he has no taxable income. To take this view however would be to read into the proviso words which are not there and to overlook that all that the section requires is that the assessment should in fact have been made under sub-section (4) of section 23. It is said that to take this view would be to deprive the assessee of a valuable remedy. That may be so, but as has been pointed out by the learned Judges of the Lahore High Court, the assessee has a remedy under section 33 of the Income-tax Act and he may also possibly in certain cases be able to question the assessment by means of a suit if he succeeds in showing that the assessment was *ultra vires* and could not have been made under the Act.

The last question is "whether on the facts of the present case the assessee is liable to be assessed under the Act". The learned Counsel for the petitioner contends that on the very facts stated in the order passed by the Assistant Commissioner on appeal as well as those set out by the Commissioner of Income-tax in his statement of the case submitted to this Court, it is clear that one of the heads of income on which the assessee has been taxed is not taxable under the Act at all. It is urged by him that the facts found by these officers should be distinguished from the conclusions of law arrived at by them or opinions expressed by them on the facts and while the former are binding upon this Court as finding of fact, the latter are not. On the other hand it is contended by the learned Assistant Government Advocate that as we are of opinion that in the present case no appeal lay against the assessment, the question as to whether on the facts of the present case the assessee is liable to be assessed under the Act is merely one of academic interest and a decision thereon is wholly unnecessary. It is urged by him that once we hold that the assessee had no right of appeal under the Act and the order rejecting his appeal is unassailable, no further question can arise for the purpose of taking action under section 66. This argument has been urged with considerable force and the majority of my colleagues are disposed to accept it. Speaking for myself, I am in some doubt as to its soundness.

On the other hand Mr. Manohar Lal who appears for the petitioner contends with some force that once it is held that the order rejecting the appeal is an order under section 31 and it is found that the order deals not only with the question of the maintainability of the appeal, but with other questions of law raised by the assessee, the High Court will have jurisdiction to decide those other questions because they arise out of the order even though it may take the view that the appeal was not competent. In this view it would seem that the present question, namely, whether the assessee's income under one of the heads was taxable at all cannot be shut out because it has been dealt with by the Income-tax authorities and does arise out of the order rejecting the appeal. The matter may be best put in this form. Assuming that on the facts of a particular case it is absolutely clear that an assessee was not liable to be taxed at all under the Income-tax Act and it is equally clear that the assessee has no right of appeal because the particular assessment has been made under section 23 (4), can it be said that if the case has come up to the High Court in due course under section 66, the High Court is debarred from saying that no assessment should have been made in the case at all, because the assessee had no taxable income under the Act? It may be assumed that the law has no sympathy with a person who has withheld material information from the Income-tax Officer by not submitting a return or not complying with the notice under section 22 (4) or

section 23 (2) and hence the Act makes the drastic provision that such a person will have no right of appeal. It does not however necessarily follow that he cannot get any relief whatsoever under the Act because he may yet move the Commissioner of Income-tax to exercise the power which he has under section 33 and if the Commissioner can relieve him under section 33, even though his right of appeal has been taken away, it is difficult to see why, assuming that the question does arise out of the order passed under section 31, or section 32, the High Court cannot or should not decide the question and the Commissioner should not give relief to the assessee under section 66 (5) if the question is decided in favour of the assessee by the High Court. I think the decision in *A. R. A. N. Chettiyar* v. *The Commissioner of Income-tax, Burma,*[7] to which I have referred in another connection furnishes an instance where it was possible for an assessee to get relief under section 66 even though no appeal lay. I find that that decision has been overruled by a Full Bench of the Rangoon High Court, but I must confess that this latter decision does not entirely remove my difficulty.

I am, however, as at present advised not disposed to disagree with the majority of my colleagues because I realise that there is a good deal to be said in support of the view which they are inclined to take and also because it appears to me that there are certain findings of fact against the assessee in this case which this Court cannot disregard or reopen at this stage. I would therefore agree to the order proposed by my Lord the Chief Justice that this application should be dismissed with costs.

DHAVLE, J.:—As regards the first question, learned Counsel for the assessee has endeavoured, by a close analysis of section 30 (1) of the Act and of the proviso to it, to show that the proviso has no application to the case of the assessee as he has no income, profits or gains coming within the Act [Section 4 (1)]. The proviso bars an appeal "in respect of an assessment made under sub-section (4) of section 23", while section 30 (1) gives an appeal "against the assessment"; but I cannot agree that the change from *against* to *in respect of* points to a difference, in favour of the assessee, between the scope of the main provision and that of the proviso. If an appeal is barred *in respect of* an assessment, it seems clear that no appeal can be maintained *against* that assessment. Mr. Manohar Lal has also laid stress on the fact that while the proviso speaks of an assessment made under sub-section (4) of section 23, section 30 (1) speaks of denying liability to be "assessed under this Act". But this only shows the limited operation of the proviso:—assessments may be made under other sub-sections of section 23 and the proviso will not bar appeals against them—a person assessed under section 23 (1) may, for instance, have occasion to question the rate, or a person assessed under sub-section 3 of that section to question the amount or rate or even to deny his liability altogether, and such assessees will not be affected by the proviso.

It has been contended that the assessment spoken of in the proviso must be a valid assessment, and reference has been made in support to the language of section 6 which bars suits "to set aside or modify an assessment made under this Act" and which has been judicially held to be inapplicable to assessments that were not supportable under the Act. It seems to me, however, that the word *assessment* in the proviso must be construed in the same way as in the main provision which runs,

(7) 2 I. T. C. 477.

"Any assessee objecting to the amount or rate at which he was assessed under section 22.. .. .. or denying his liability to be assessed under this Act .. .. .. may appeal to the Assistant Commissioner against the assessment .. .. .." The appeal against the assessment is thus not confined to the amount of tax that the assessee may be called upon to pay, but may also be rested on the ground that the assessee is not at all liable to be taxed under the Act. If the word *assessment* is construed in the same way in the proviso, it is clear that where an assessment is made under sub-section 4 of section 23, the assessee cannot appeal on the ground that he is not liable at all under the Act or indeed on any ground whatsoever.

How do assessments under sub-section 4 of section 23 come to be made? Under section 22 (2) of the Act, the Income-tax Officer shall serve a notice requiring a return of the total income upon any person (other than a company) whose "total income"—an expression defined in section 2 (15) of the Act and limited to sources to which the Act applies—is, in the Income-tax Officer's opinion, of such an amount as to render him liable to income-tax. If the person fails to make the return, or (as further in this case) fails to comply with the terms of the notice issued under sub-section (4) of section 22, sub-section (4) of section 23 provides that the Income-tax Officer shall make the assessment to the best of his judgment. The scheme of the Act further is that while any assessee denying his liability to be assessed under the Act may under section 30 (1) appeal against the assessment, no appeal shall lie in respect of an assessment made under sub-section (4) of section 23. The liability to be assessed under sub-section (4) of section 23 is only a particular instance of liability to be assessed under the Act, and it is this latter that is mentioned in section 30 (1) as one of the reasons for an appeal against an assessment. But for the proviso, a person assessed under sub-section 4 of section 23 could have appealed against the assessment on the ground that he was not liable under the Act at all, and the proviso bars an appeal by such a person on any ground whatever.

It seems clear from this that where the Income-tax Officer has served notices under sub-sections (2) and (4) of section 22 upon a person whose income was, in the Income-tax Officer's opinion of such an amount as to render him liable to income-tax and such person has failed to comply with either of the notices, the Income-tax Officer's jurisdiction to make an assessment under sub-section 4 of section 23 depends not (as contended for the assessee) on the actual existence of an income—taxable income of an amount above the limit of exemption, but upon an honest finding by him that the assessee has such income. Whether the proviso actually applies in any particular case or whether the Income-tax Officer has made a colourable use of sub-section (4) section 23 in an improper endeavour to shut out an appeal, will undoubtedly be a matter for the Assistant Commissioner to whom appeals lie under sub-section (1) of section 30; but that is no reason for holding that notwithstanding the proviso, an assessee is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. I therefore agree in holding on the first question that the proviso to section 30, clause (1) is a bar to the appeal.

I have already observed that it is for the Assistant Commissioner, to whom appeals lie against assessments made by the Income-tax Officer, to decide whether an appeal against an assessment which purports to be made under sub-section (4) of section 23 is barred by the proviso to sub-section (1) of section 30. If the decision of the Assistant Commissioner be in favour of the assessee, there can be no question that the appeal must be heard on the

merits and that the order disposing of the appeal will be "an order under section 31", so as to attract the operation of sub-sections (2) and (3) of section 66. Where, however, the Assistant Commissioner holds that an appeal is barred by the proviso, it has been urged by learned Counsel for the Income-tax Department that there is no order passed under section 31 and that consequently the assessee is not entitled to resort to the provisions of sub-sections (2) and (3) of section 66 for coming up to the High Court on questions of law. It appears to me that this contention is unsound. If the order be not an order under section 31, there is no other section in the Act under which it can come. It is true that section 31 deals with the hearing of the appeal, but does this necessarily mean a hearing of the appeal on the merits? A hearing on the preliminary question whether an appeal lies is just as much an exercise of jurisdiction by the appellate authority as a hearing on the merits. Nor can it be definitely said, having regard to the scheme of the Act, that the Legislature must have intended to bar not only appeals but also proceedings under section 66 in the case of assessments under sub-section (4) of section 23. The defaults that bring sub-section (4) of section 23 into play have before now actually given rise to questions of law, and I see nothing improbable or incongruous in the legislature disallowing appeals against assessments while leaving it open to the assessee to obtain a reference to the High Court under sub-sections (2) and (3) of section 66 on questions of law arising out of the order of the Assistant Commissioner rejecting an appeal on the ground that it is barred by the proviso to sub-section (1) of section 30. References arising out of orders relating to the proviso to section 30 (1) have actually been entertained by more than one High Court, and Sec. 66 does not in terms require as a foundation an appellate order on the merits but only "an order under Sec. 31". The summary assessment under section 23 (4) and the barring of an appeal against the assessment under the proviso to section 30 (1) are the penalty for the defaults specified in sub-section 4 of Sec. 23 and if it had been intended by the Legislature to add to this penalty by depriving the assessee of any assistance under section 66, I consider that that would have been done in unmistakable terms. I would therefore overrule Mr. Agarwala's contention.

In the view that I have taken on the first question referred to us, it seems to me that the second question does not arise. That is necessarily a question of law only, and the assessee is not entitled to obtain mere *obiter dicta*.

I also agree to the order about costs.

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[458] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice L. G. Mukerji and Mr. Justice Boys,

[26th June, 1931]

Messrs Palu Mal Bhola Nath .. *Assessees.*

v.

The Commissioner of Income-tax, United Provinces.

Income-tax Act (XI of 1922) Secs. 23 (4), 27, 31 & 66 (2) & (3)—Refusal to re-open Sec. 23 (4) assessment—Appeal against assessment and refusal order—Assessment set aside—Reference proceedings in Court, maintainability of.

Where an appeal against an assessment under Sec. 23 (4) of the Income-tax Act was dismissed by the Assistant Commissioner who in the appeal against the order of the Income-tax Officer rejecting the application under Sec. 27 set aside the assessment and an application to state a case on questions arising out of the order dismissing the appeal was refused by the Commissioner,

HELD that the proceedings in the High Court for an order to direct the Commissioner to state a case entirely fell through on the setting aside of the assessment.

Application [Miscellaneous Case No. 42 of 1931] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, United Provinces to state a case for the opinion of the High Court.

JUDGMENT

This was an application by one Pallu Mal Bhola Nath asking this Court to direct the Commissioner of Income-tax to state a case. The matter came up before the Court on 10th January 1931, and this Court issued a notice to the Commissioner of Income-tax to show cause why he should not state a case.

In accordance with this notice the learned Government Advocate has appeared.

It appears that the applicant took simultaneously two proceedings. The Income-tax Officer made an order against him assessing a tax under section 23 (4) of the Income-tax Act. The applicant filed an appeal against that order under section 31 of the Income-tax Act, and also took steps by way of an application under section 27 of the same Act. His appeal under section 31 was rejected and so was his application under section 27 of the Income-tax Act. The applicant thereupon filed an appeal against the order rejecting his petition under section 27. That appeal was accepted by the Assistant Commissioner, and the assessment was set aside on 5th July 1930, and a re-assessment was directed to be made.

Against the order by which his appeal against the assessment was rejected the applicant went to the Commissioner of Income-tax and asked him to state a case. It was on his refusal to do so that the applicant came before us.

Now that it appears that there is no assessment; as the result of the order dated 5th July, 1930, the present proceedings entirely fall through. The questions of law have now no value to the assessee, and we cannot be expected to give an opinion on a matter of pure law where no assessee is to be affected thereby.

We accordingly dismiss the application and direct the assessee to pay the costs of the Crown. We assess the fee of the learned Government Advocate at Rs. 100. He will have the usual time within which to certify the receipt of the fee.

[459] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice L. G. Mukerji and Mr. Justice Allen,

[3rd July 1931]

Basant Rai and others .. *Assessees.*

v.

The Commissioner of Income-tax,
United Provinces .. *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 66 (5)—Decision of Court on reference—Duty to reassess subsequently.

After a reference under the Income-tax Act has been answered by the High Court it is the duty of Income-tax Department, in the presence of the assessee, to take up the assessment for reconsidering the figures in the light of the decision of the High Court, though the actual assessment may not be affected thereby or affected adversely to the assessee.

Application [Miscellaneous Case No. 655 of 1930] by the assessee for directions to the Commissioner of Income-tax, United Provinces.

JUDGMENT

To-day the Government Advocate has appeared on behalf of the Crown, and states that "the Income-tax Commissioner in whose time the order of this Court was passed evidently considered that the High Court's judgment did not have the effect of rendering assessment liable to alteration. It was, therefore, not reconsidered. In a technical sense this view was not entirely correct, but the result of such recalculation would probably have left the tax unaffected, and the practical effect of the assessment would have been nil. As to the future the matter lies with the High Court. If the High Court holds that its judgment rendered assessment liable to alteration, and will clearly indicate in what respect alteration is needed, the directions will, of course, be followed and assessable income recalculated." The statement of the learned Government Advocate shows that the Commissioner in whose time the judgment was made is no longer holding the position, and it is not clearly found under what circumstances the question of re-assessment was not taken up.

It is the duty of the Income-tax Department to take up the question of re-assessment, after a reference by the Commissioner of Income-tax has been answered by the High Court, and to see, in the presence of the assessee whether, in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say that material alteration in the figure of assessment is not expected and therefore re-assessment is not necessary.

The learned Commissioner has left the matter in the hands of the High Court, and has asked for directions. All the directions that the High Court need give are these, that the re-assessment has to be taken up, after notice to the assessee, and the figures should be reconsidered in the light of the

decision of the High Court. It may be that as the result of the judgment of the High Court the actual assessment will not be affected, or will be affected adversely to the assessee himself. Whatever be the result, the matter has to be reconsidered, and we expect that in this case also it will be reconsidered.

As the assessee has got all he wanted, his application does not call for any further orders, except as to costs. As the assessee had to come up to the High Court, and his complaint was justified, we allow him costs of the hearing of this application, assessing the amount of counsel's fee at Rs. 100 to be taxed in accordance with the rules of the High Court. The Government Advocate has appeared twice, and we assess his fees at Rs. 100 for each occasion, namely Rs. 200 in all, subject to his certifying payment of the fees within the time allowed by the rules.

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[460] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice L. G. Mukerji and Mr. Justice Allen,

[10th July, 1931]

Seths Basant Rai and Takhat Singh .. *Assessees.*

v.

The Commissioner of Income-tax,
United Provinces *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 9, 10 & 12—Buildings erected on leased lands—Rents, if assessable under Sec. 9 or 10—Erection expenditure, Deduction of, in assessment under Sec. 12—Allowance for collection charges—Percentage on annual value or realisation.

Where masonry buildings were erected on lands taken on a lease for 30 years with option of renewal on enhanced rent for two successive periods of 30 years, the lands with the buildings thereon to revert to the lessor on the expiry of the lease, the rent received from them is assessable under Sec. 12 of the Income-tax Act and not under Sec. 9 or 10. In computing the assessable rent the allowance to be made under Sec. 12 (2) should be an annual deduction of the amount of the erection expenditure divided by the principal term of the lease without regard to the renewal option terms.

Erection of buildings for rent is investment and not a trade.

Under Sec. 9 of the Act it is in the discretion of the Income-tax Officer to allow a deduction of 6% on the actual realisations of rent as collection charges and it is not obligatory on him to allow this percentage on the annual value.

Case [Miscellaneous Case No. 5 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

Application [Miscellaneous Case No. 156 of 1931] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, United Provinces to state a case for the opinion of the High Court.

CASE

The assessee is a Hindu undivided family named in the assessment record as Seths Basant Rai Takhat Singh of Roshan Muhalla, Agra.

2. For the year 1929-30 the assessee was assessed on an income of Rs. 57,979. Of this a sum of Rs. 14,425 was derived from property owned by the assessee and was assessed under section 9 of the Income-tax Act. The remainder Rs. 43,554 was assessed under section 12 and was derived from the rents of buildings erected by the assessee upon land leased from the Agra Cantonment authority.

3. The assessee appealed and his appeal was rejected by the Assistant Commissioner.

4. He now applies under section 66 that certain questions of law alleged to arise out of the Assistant Commissioner's appellate order may be referred to the High Court. Copies of the assessment order, of the assessee's appeal, of the appellate order, and of the assessee's application are in Appendix A, B, C and D*

5. The application alleges that eight points of law arise. Most of these points cannot be referred because they are not questions of law, or do not arise on the facts.

In this category fall:—

Point (*b*), the Assistant Commissioner having held that the assessee did not carry on banking business during the previous year,

Point (*d*), the Assistant Commissioner having held that the assessee had failed to prove that he had borrowed money for the purposes of constructing the buildings,

Point (*f*), which even as stated is a question of fact, and

Points (*g*) and (*h*), both of which merely question the exercise or non-exercise by the Income-tax Officer of a discretion vested in him by the law.

6. The remaining points (*a*), (*c*) and (*e*) concern questions of law which in the opinion of the Commissioner do arise out of the appellate order.

7. The facts relevant to these points are as follows:—

The assessee leased certain land from the Cantonment authority under a 25 years lease, and erected buildings thereon. He has now received a fresh lease of the land for a term of 30 years, the lease being renewable for two further terms of 30 years. On the expiry of the lease the land together with the buildings will revert to the Cantonment authority.

* Not printed.

The Income-tax Officer, though personally thinking that the rents received for the occupation of these buildings were assessable under section 9, felt himself bound to follow the ruling given by the Allahabad High Court in the case of this same assessee,* and assessed the rents under section 12.

8. The assessee does not claim that these rents are assessable under section 9; his claim as set forth in points (*a*) and (*b*) is that the taking of the land on lease, the erection of buildings thereon, and the leasing of the buildings on rent constitute a business, the profits or gains of which are assessable under section 10, and that in accordance with section 10 (2) (vi) the profits and gains should be computed after making an allowance in respect of depreciation of the buildings.

9. The Commissioner prefers to state the question at issue in somewhat different terms:—

Question:—(*i*) "Where the assessee has taken land on a long lease under which the land together with the buildings thereon will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, is the tax payable by the assessee in respect of the rents to be determined in accordance with section 9, or with section 10, or with section 12."

10. The claim embodied in point (*e*) is, if the Commissioner rightly understands the assessee's intention, an alternative to the claim embodied in points (*a*) and (*c*), and is not put forward unless in the view of the High Court the tax payable by the assessee is to be determined in accordance with section 12. In that event the assessee is understood to claim that the expenditure incurred in the erection of the buildings was expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the rents received by the assessee, and that allowance for the expenditure should be made before computing the assessee's income, profits and gains; and further that the allowance should be made by spreading the expenditure in equal annual amounts over the period of the lease.

11. The Commissioner prefers to state the question in the following terms:—

(ii) (*a*) In the circumstances stated in question (i) is the assessee entitled, in accordance with section 12, to allowance for the expenditure incurred in the erection of the buildings?

(*b*) Is the allowance receivable in the form of an annual deduction equal to the amount of the expenditure divided by the years of the term for which the assessee holds the land on lease?

12. In the opinion of the Commissioner the answer to the first question is that the tax payable by the assessee in respect of the rents is to be determined in accordance with section 12.

The assessee is not the owner of the buildings; he has in them a limited interest which does not amount to ownership within the meaning of section 9. Section 9, therefore, is not applicable, though it would be applicable were the assessee the owner of the buildings.

* 4 I. T. C. 324.

As regards section 10, one objection to holding that the erection and leasing out of buildings can constitute a business carried on by an assessee is that this view would bring section 10 of the Act into conflict with section 9. If in the present case the assessee is carrying on a business it would follow that every person who erects buildings and leases them out on rent is carrying on a business. And since the fact that the person happened to own the land together with the buildings would not make his operation any the less a business, "property" in such a case would be assessable either under section 9 or section 10. It is submitted that this result would be contrary to the obvious intention of the Act and must, therefore, be wrong.

There remains only section 12 as the section under which the tax payable by the assessee is to be determined.

The Commissioner is fortified in this view by the decision of the Allahabad High Court already quoted. It is true that in giving that decision the High Court understood that the buildings in question in that case were entirely of a temporary nature. Still in the opinion of the Commissioner the degree of permanence of buildings and the term of the lease of land are not factors which can affect a decision in such a case.

The Commissioner further relies on a pronouncement made by the Calcutta High Court in *Gooptu Estates Limited* v. *Commissioner of Income-tax, Bengal.*[1] In the course of that judgment the Court observed, "Looking at the assessees as owning leasehold property from which they derive a revenue we find that they are charged and chargeable under section 12 with the whole of the net rent notwithstanding that it is derived from a wasting asset."

13. Question (ii) will only be for decision in the event of the Court holding that the tax payable by the assessee is to be determined in accordance with section 12. In that case the Commissioner is of the opinion that no allowance is due for the expenditure incurred in the erection of the buildings. Although the asset to the assessee represented by the buildings is in the nature of a wasting asset, the expenditure which created the asset is clearly "in the nature of capital expenditure" and, therefore, is not expenditure for which allowance is to be made under section 12 (2). On this view question (ii) (*b*) does not arise.

JUDGMENT.

Misc. Case No. 156 of 1931.

These two income-tax matters arise out of the same facts. In Misc. Case No. 5 of 1931 the Commissioner of Income-tax has stated a case, and in Misc. Case No. 156 of 1931 the assessee in Misc. Case No. 5 has made an application that the Commissioner of Income-tax should be asked to further state a case, namely, regarding that portion of the assessee's application in respect of which the Commissioner found no reason for stating a case.

The two matters relate to the same assessee and arise out of the same year of assessment, and therefore should be and are being, taken together. The applicants, Seths Basant Rai and Takhat Singh, are members of a joint Hindu family and represent in their person other members who are not assessees in their own names. The family will be called, hereinafter the "assessee".

1. 4 I. T. C. 146.

The assessment in question was for the year 1929-30 and the assessee family has been assessed on an income of Rs. 57,979. Out of this sum Rs. 14,425 was derived from "property" owned by the assessee, and was assessed under section 9 of the Income-tax Act. The remainder Rs. 43,554 was assessed under section 12 of the Income-tax Act, being derived from rents of buildings erected by the assessee upon land leased from the Agra Cantonment authority.

The assessment, as usual, was made by the Income-tax Officer, and it was an assessment made after examining one of the assessees and his munim and the account books of the family, and was on the merits of the case. The assessee, being dissatisfied, went in appeal to the Assistant Commissioner, and the Assistant Commissioner rejected the appeal on the 29th August 1930. Thereupon the assessee petitioned the Commissioner of Income-tax to state a case, and his application, as already stated, was partly allowed and partly disallowed.

The Commissioner of Income-tax has framed three questions for being answered by this Court, and they are as follows:—

(1) Where the assessee has taken land on a long lease, under which the land together with the buildings thereon will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, is the tax payable by the assessee in respect of the rents to be determined in accordance with section 9, or with section 10, or with section 12?

(2) In the circumstances stated in question (1) is the assessee entitled, in accordance with section 12, to allowance for the expenditure incurred in the erection of the buildings?

(3) Is the allowance receivable in the form of an annual deduction equal to the amount of expenditure divided by the years of the term for which the assessee holds the land on lease?

The grievance of the assessee is that certain other questions should have been framed, and these questions are given in the application, and are as follows:—

(1) Whether the discounting of bills (hundies), either for the purpose of paying up an old loss, or for the purpose of banking, constitutes business within the meaning of that term as used in the Income-tax Act, and whether the hundiawan or discount paid on these hundies can be set off against the income, profits or gains derived by the assessee from any other source?

(2) Whether it is obligatory on the Income-tax Officer to issue a notice under section 23 (3) of the Income-tax Act to the assessee to produce further evidence before assessing the income-tax if after issuing a notice under section 23 (2) of the Act he entertains any doubt on any specific point?

(3) Whether the Income-tax authorities can ignore some of the evidence laid before them, and are entitled to record a finding of fact without taking into consideration the entire evidence on the record?

(4) Whether under the circumstances of the present case, the finding recorded by the Income-tax authorities that the loan in respect of which the interest and hundiawan amounting to Rs. 27,755 were paid was not borrowed by the assessee for constructing the leasehold property, is a proper finding of fact not liable to be challenged in the Hon'ble the High Court?

(5) Whether the amount of interest or discount paid in respect of hundies drawn for borrowing money for constructing the buildings on land obtained on a lease for a limited number of years when under the terms of the lease such buildings on the termination of the lease will become the property of the lessor, is a proper deduction within the meaning of section 10 or 12 of the Income-tax Act?

(6) Whether the statutory allowance of 6 per cent is to be calculated on the annual value of the property or on actual realisation of rent in accordance with the rules framed under the Income-tax Act?

(7) Whether the income from leasehold property falls under section 10 or under section 12 of the Income-tax Act?

The facts which have given rise to the reference and to the application briefly are as follows: The assessee owns some house property as to which there is no dispute. The income from that house property has been assessed under section 9 of the Income-tax Act. Another source of income of the assessee is from rents of temporary buildings erected by him on land taken by him on lease from the Cantonment authority of Agra. One of the conditions of the lease is that at the expiration of it, the buildings will become the property of the Government and the lessee will have no right to them (buildings). The contention of the assessee is that such property should be taxed as falling under section 10 of the Income-tax Act under the head "Business," and not under section 12 as income from "other sources." This dispute has been referred to the High Court by the Commissioner, and forms the subject-matter of the two questions referred by the Commissioner.

The assessee had some banking business which he stopped, but on account of that business he incurred certain debts and he has been paying interest on these debts. One of his contentions is that the interest that is paid by him should be deducted from the taxable income found by the Income-tax Department at the figure Rs. 59,000 and odd.

This contention forms the subject matter of the first question propounded by the assessee in his application. The question that has been framed is different from the question (b)* to be found at page 12 of his application to the Commissioner. Ordinarily, it should not be open to an assessee to attempt to make out a different case and to propound a different question for answer by the High Court when he has not asked the Commissioner to put the same question before the High Court. This is so for obvious reasons. It is possible that if the question had been put in the form in which it has been put to the High Court, the Commissioner would have accepted it as a valid question. However, in this particular case the question (b) at page 12 related to a question of fact, and the finding of the Assistant Commissioner as the appellate officer is final. The question (b) at page 12 suggested that there was a third business, though it was no source of income of the assessee, in the shape of discounting bills and paying discount. It has been held that

* "Whether the discounting of bills (hundies) and paying hundiawan thereon constitute business and can the loss suffered thereunder be set off against the income, profits or gains of other sources within the meaning of section 24 of the Act?"

he had no such business. The fact that the assessees drew hundies for their own debts and paid interest in the shape of hundiawan could not be taken as a business, and the matter is concluded by the finding of fact.

Questions Nos. 2-4 relate to the same matter, which is this. The assessee has paid interest to the amount of Rs. 27,755 in the year the income of which is the basis of taxation. It was claimed that, at least, a part of the money on which the interest was paid had been spent in erecting the temporary buildings in the Cantonment of Agra, and therefore this money was spent for the purpose of earning the rent over which income-tax is being charged. On this point the finding is that the assessee has failed to prove that the money was borrowed for purposes of constructing new buildings. This is a finding of fact, and is conclusive so far as this court is concerned. Now it is argued that this finding was arrived at by adopting a wrong method, and it was obligatory on the Income-tax Officer to issue a notice under section 23 (3) of the Income-tax Act to the assessee to produce further evidence before assessing the income-tax, if the officer entertained any doubt on any specific point. It appears that one of the applicants and the assessee's munim were examined by the Income-tax Officer. They made divergent statements as to how much was spent on erecting the buildings in the Cantonment. One said that the entire money borrowed had been spent, and the other said that a part of it had been employed in erecting the buildings, but he was unable to state how much of it had been so spent. It is argued that the witnesses were taken unawares, and the Income-tax Officer should have framed an issue on the point and then asked the assessee to adduce evidence. There can be no doubt that in a proper case, the assessee should be put in a position to know what is the point for enquiry, and he should not be kept in the dark on that point. But in this particular case the matter under enquiry was as plain as anything and the assessees knew that the only point that they had to establish was the amount of money spent by them over the buildings. In the circumstances, we do not think that the questions Nos. 2-4 need have been stated by the Commissioner as points for determination by the High Court.

Question No. 5 as framed in the petition before this Court, has been accepted by the Commissioner.

Question No. 6 relates to a matter of discretion, and does not raise any point of law. It appears that a certain deduction has been made from the profits of the assessee as the cost of realisation of rent. The question raised is whether the percentage allowed should be the percentage on the amount of actual realisation or on the amount of the annual value. The maximum amount to be allowed has been laid down as 6 per cent on the annual value. As the 6 per cent allowed on the annual realisation is within the maximum, it was open to the Income-tax Officer to allot that amount. The mere fact that the words '6 per cent' have been used does not compel the Income-tax Officer to allow this percentage on the total annual value.

Question No. 7 is covered by question No. 5. In the result we do not see that anything has been omitted by the Income-tax Commissioner from his statement of the case which should have formed a part of the reference. In the result, we dismiss the application dated 10th February 1931 made by the assessee asking this Court to call on the Commissioner of Income-tax to state a case. The assessee will pay the costs of this application to the Crown, which will include the Government Advocate's fee, which we assess at Rs. 100, as to which he will certify within the period allowed by the rules.

Misc. Case No. 5 of 1931.

Now we take up the reference itself.

The first question is whether the method of assessment should be that laid down in section 10 of the Income-tax Act or under section 12. It appears that the case of these very assessees came before this Court in respect of assessment of an earlier year, and a Bench of this Court,* of which one of us was a member, held that the case fell under the provision of section 12. The Commissioner has quoted a decision of the Calcutta High Court† in which the opinion was expressed that where the rent is derived from what has been described as a wasting asset the income falls under section 12.

There can be no doubt that the property which has come into existence by the erection of the temporary buildings is not a permanent property of the assessee. At the end of thirty years, if the lease is not renewed, the property will cease to be the property of the assessee, and his income from the property will also cease. The case therefore, does not fall under section 9.

It is argued for the assessee that the case falls under section 10, namely, "Business". "Business' as defined in the Act "includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture". Can it be said that the erection of buildings for the purpose of rent is a 'trade'? It may be an investment but it is not trade. After the buildings had been erected, the only thing that has to be done to earn the profits is to collect the rents. This can hardly be called a trade. But it was argued that when the idea of the assessee was to invest the money in buildings the idea was to engage in a trade; but the word "business" has been used in contradistinction to the word "property", and if we accept the argument of the assessee, the head "property" should not exist in the Act and it should fall within the definition of trade where the investments of a man are in house property. We sec no reason to differ from the previous decision of this Court.* In answer to question No. 1 as framed by the Commissioner, we hold that the assessment should be made under section 12 of the Income-tax Act, as has already been done.

Question No. 2 is whether the assessee is entitled to any deduction on account of the expenditure made by him in the erection of the buildings, and if so how that deduction is to be made.

We are of opinion that the assessee is entitled to a deduction. According to sub-section (2) of section 12 of the Income-tax Act "such income, profits and gains shall be computed after making allowance for any expenditure incurred solely for the purpose of making or earning such income" etc. The exception is that where money has been spent in the nature of capital expenditure it cannot be deducted. Where money is spent on the erection of a permanent building of which the builder is the full owner there is a capital expenditure. But where, as in this case, the person constructing the buildings knows that the buildings would be his for a limited number of years, he

* Reported as 4 I. T. C. 324.

† *Gooptu Estates Ltd.* v. *Commissioner of Income-tax, Bengal* 4 I. T. C. 146.

does not want to lose the capital at the end of the term of the lease, but he desires that by the end of the term of the lease he should be able to pay himself back not only a reasonable profit on the money laid out, but the actual money laid out by him as well. In the circumstances, it cannot be said that the money spent in erecting the buildings is in the nature of capital expenditure.

Thus we are of opinion that the assessee is entitled to a deduction year by year, so that the money expended by him for the purpose of earning an income may come back to him ultimately. This is our answer to clause (a) of question No. 2.

Clause (b) of question No. 2 is directed to an enquiry as to how the deduction is to be made. We have had the terms of the lease read out. It appears that at the end of 30 years it would be open to the lessee to have the lease renewed for another term of 30 years, but on a rent which may be enhanced 50 per cent. Similarly at the end of 60 years it would be open to the lessee to have the lease extended by another 30 years, but again with the liability of the rent being enhanced by 50 per cent. After 90 years, there would be no renewal of the lease. Whenever the lease terminates, the lessor would become the owner of the buildings. Among other terms of the lease one is to the effect that if the rent due for six months remains in arrear for a period of six months, it would be open to the lessor to terminate the lease.

It was argued on behalf of the Crown that as it was open to the lessee to continue the lease for a term of 90 years, the expenditure made by him over the buildings should be divided by 90, and the sum representing the expenditure should be deducted annually from the income earned for the purposes of assessment of income-tax.

For the assessee it is argued that the assessee is entirely in the dark as to whether it would be profitable to him or not to have the lease renewed at the end of 30 years, and his endeavour should be to be able to call back his money in the course of 30 years. At the end of 30 years, if the lease is renewed by the lessee, he would not be entitled to any further deduction on account of the cost of the buildings, and income-tax will have to be paid on the gross rental without any deduction on account of the cost of the building.

In our opinion, the argument of the assessee is the sounder and more reasonable. We accordingly answer the question as follows. The allowance to be made should be in the form of an annual deduction equal to the amount of expenditure divided by 30—30 years being the principal term of the lease—without regard to the term or terms to which the lease may be extended hereafter.

With regard to the reference made by the Commissioner, the assessee has substantially succeeded. We direct that the assessee shall get his costs from the Crown. The deduction claimed has been allowed though we have upheld the Commissioner in the view that the assessment should be made under section 12. We assess the fee of the counsel for the assessee in this reference at Rs. 100, and we assess the fee of the counsel for the Crown at the same figure. The Government Advocate will file his certificate of fees within the period allowed to him by the rules.

(461) IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Arthur Page Kt., Chief Justice, Mr. Justice Baguley and Mr. Justice Sen.

(14th July, 1931.)

S. Warwick Smith .. *Assessee.*

v.

The Commissioner of Income-tax, Burma .. *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 4 (3) (vii)—Mining Engineer obtaining prospecting and mining licenses—Mines not worked and rights sold away—Assessment as profits of a business—Income, if casual and non-recurring—Question one of fact.

The assessee, a mining Engineer prospecting for tin since 1920, obtained a prospecting license in 1924 and after carrying on work at the mines got a mining license in 1926. In 1928-1929 he sold an option over the area to one M for £ 6,000 under an arrangement for the sale of the properties subsequently to a company for £ 70,000 inclusive of the option price. In respect of another mine he entered into a partnership agreement for sharing the profits from its sale and at no material period had he sufficient capital to develop the mines as his own business. The Income-tax authorities found that the assessee prospected for tin with a view not to work the mines himself but to sell his rights and assessed the sum of £ 6,000 as profits of a business carried on by him, negativing his contention that the receipt was a casual and non-recurring one from an investment in the acquisition of the licenses. On a reference to the High Court,

HELD that the question was one of fact and that there was evidence justifying the findings.

Case [Civil Reference No. 7 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

The following case is referred to the High Court under the provisions of section 66 (2) of the Indian Income-tax Act, 1922.

2. Mr. S. Warwick Smith (hereinafter called the assessee) a mining engineer by profession has been since 1920 prospecting for tin in the Palaw Township of the Mergui District. In 1924 he held prospecting licenses over four areas in the Palaw Township. One of these areas known as the Tonbuchaung area comprising 3¼ square miles was taken up by him in November 1924. In 1926 he obtained a mining lease for 30 years over this area. Since 1924 he had been working the area and obtaining a small output of tin from it. During the financial year 1928-29 he sold an option over the area to a Mr. McKeown and received £ 6,000. Subsequently the area was sold outright to The Malayan and General Tin Trust, Ltd., for £70,000, this sum to include the sum of £ 6,000 already paid. This case is concerned with the option money £6,000 received by the assessee.

3. When the Income-tax Officer came to make his assessment for 1929-30 he considered this receipt of £ 6,000 and coming to the conclusion that it was a taxable receipt he included it in the assessment. A copy of the assessment order is attached and marked A.*

4. Against this decision the assessee appealed. The assessment was confirmed by the appellate officer, copy of whose order is attached and marked B.* As the assessee was dissatisfied with this order he has asked me to refer the following questions to the High Court:—

(1) Does the fact that a mine or adventure owned by an assessee is made an attractive proposition to any prospective purchaser convert the transaction of sale of such mine or adventure from a realisation of capital into an acquisition of profit?

(2) Having regard to the facts found by the Income-tax Officer and the Assistant Commissioner, is the decision that the profits from the sale of the mine in question formed are taxable as being profits arising from business justified?

(3) Is there any evidence which has justified the decision that what was done was the carrying on or carrying out of the business?

I do not refer these questions as formulated by the assessee. In my opinion the only question that arises in the case is as follows:—"Is there evidence on which it can be held that the receipt in question, *viz.*, £ 6,000 is a taxable profit?"

5. The contention of this Department is that the receipt in question is a receipt from business and therefore taxable, the assessee's business being that of a mining prospector who takes up concessions over mineral bearing areas in the hope of selling them. In the argument for the assessee on appeal stress was laid on the isolated nature of the transaction but the case against assessee rests not on the number of his transactions but on the very nature of his business as a prospector.

6. The evidence in the case is as follows:—The assessee has been a prospector in the Mergui District since 1920. He has taken up several concessions. He had little capital and certainly not enough to develop the area now sold which covers 3¼ square miles. When he took up this area he must have known that he had not the capital required to develop it. The facts do not differentiate his case from that of the ordinary independent prospector and it is common knowledge that the ordinary independent prospector lives and works in the hope of selling a rich find. The Income-tax Officer of the district who may be considered to know something of the nature of the assessee's business has come to the conclusion that the receipt now in dispute is a business receipt and on the facts and my own knowledge and experience in regard to the transfer of mining concessions in Burma I agree with him.

7. In my opinion therefore there is evidence on which the receipt can be held to be taxable.

Mootham, for the Assessee.

Eaaar, for the Crown.

* Not printed.

JUDGMENT.

PAGE C. J.:—This is a reference under section 66 (2) of the Indian Income-tax Act, 1922, by the Commissioner of Income-tax, Burma, to the following effect: "Is there evidence on which it can be held that the receipt in question, viz., £ 6,000, is a taxable profit?".

It appears that the assessee, who is a mining engineer, started prospecting in Burma for tin in 1920. In that year he obtained a prospecting license for a mine in Sinto, and he stated in his evidence before the Income-tax Officer that he worked the Sinto mine until it proved unpayable, and that he had sunk in it about Rs. 15,000 apart from the value of his own work on the land. In 1924 he obtained prospecting licenses over 4 areas in the Palaw Township. One of the areas was known as Tonbuchaung, and in respect of that area he obtained his prospecting license in November 1924. In 1926 he obtained a mining lease for 30 years of this area. For five years the assessee carried on work at the mine, and in the year of assessment 1928-29 he made an agreement with McKeown under which McKeown obtained an option to purchase the assessee's rights over this area for £ 6,000, the arrangement being that a company should be formed and if the company purchased the assessee's rights the £ 6,000 should be treated as part of the purchase price. In the event the Malayan and General Tin Trust, Ltd., purchased the property for £ 70,000, and one of the conditions of the sale was that the £ 6,000 already received by the assessee should be treated as part of the £ 70,000 purchase price.

The question to be determined is whether this sum of £ 6,000 fell within section 4 (3) (vii) of the Income-tax Act which runs as follows:—(3) This Act shall not apply to the following classes of income:—(VII) Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee. In other words, the question is whether this £ 6,000 was received by the assessee as part of the profits of a business carried on by him, or was merely a casual and non-recurring receipt which he obtained through selling certain rights that he possessed.

This is a question of fact, and it is not contended on behalf of the assessee that the Income-tax authorities have misdirected themselves as to the law in determining this question of fact. On behalf of the assessee it was alleged and contended that he did not carry on a business of acquiring prospecting licenses to exploit a mine for tin, but that he intended as an investment to acquire these prospecting licenses, and, if he was successful in finding tin, to work the mine himself. If that was so, no doubt this £ 6,000 would not be assessable as being the profits of a business carried on by him, but would be a capital receipt in the nature of the purchase price obtained by the assessee through selling his own property. On the other hand on behalf of the Crown it is contended that the evidence led irresistibly to the conclusion that the transaction in question was a business transaction in which the assessee was engaged with a view to prospecting for tin, and, if he was fortunate enough to find it, to carry on such mining operations as might be necessary to establish the fertility of the mine, and then either directly or indirectly to float a company in order that he might make a profit by selling his rights.

It has been found by the Income-tax Officer that in August 1924, some months before the Tonbuchaung prospecting licenses were obtained, the assessee was seriously ill with a disease which rendered him for long periods bedridden, and eventually compelled him to leave Burma, and the Income-tax Officer drew the inference from this fact that the allegation of the assessee to the effect that he only sold this property because he was too ill to carry on the mine himself was one that could not be accepted. It has further been found as a fact that in connection with another prospecting license for Pachaung there was a partnership agreement entered into between the assessee and other parties with a view to sharing any profits that might be obtained through the sale of that mine, and it has further been found as a fact that at no material period was the assessee possessed of sufficient capital to make it possible for him to develop the mine as his own business. The Income-tax Officers using the information at their disposal have also found that there is no difference between the position of the assessee and that of a large number of prospecting engineers who from time to time came to the District with a prospecting license over an area from which it is hoped that tin can be extracted, and who sell their rights after tin is found to a company with a view to making a profit therefrom. In the circumstances obtaining in the present case we find that there was ample evidence to justify the finding at which the Income-tax authorities arrived, namely, that the assessee intended to come to Burma, and as a matter of business to prospect for tin with a view, not to working the mines himself, but if he was fortunate enough to find tin to sell his right. In our opinion the finding of the Income-tax authorities to the effect that upon the facts at their disposal the assessee was carrying on a business of this nature was justified by the materials before them, and we answer the question propounded in the affirmative.

The reference being answered in this sense the assessee must pay the costs of the Commissioner 10 gold mohurs.

BAGULEY, J. :—I agree.

SEN, J. :—I agree.

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(462) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice L. G. Mukerji and Mr. Justice Sen.

(16th July, 1931.)

The Right Revd. C. J. G. Saunders .. *Assessee.*

v.

The Commissioner of Income-tax, United Provinces .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 4 and 7 (1)—Allowance paid in London to Bishop of Lucknow—Gratuitous and unconditional payment—If accrues or arises in British India—Assessment as salary.

The sum of money paid annually in London by the Trustees of Colonial Bishopric Fund as a gratuitous unconditional personal allowance of the holder of the Lucknow See to the Lord Bishop of Lucknow residing at Allahabad is income accruing or arising in British India and assessable as salary under Sec. 7 (1) of the Income-tax Act.

Case [Miscellaneous Case No. 346 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the High Court.

CASE.

This reference is made upon the application of the assessee, the Right Revd. C. J. G. Saunders, M. A., Bishop of Lucknow.

2. The contentions raised by him relate solely to the assessment of sums annually received by him from the Trustees of the Colonial Bishopric Fund.

3. At the time of the creation of the Lucknow See in 1893, subscriptions were collected in and outside India and the proceeds were vested in the Trustees of the Colonial Bishopric Fund, London. The amount collected in England was £16,072-11-1, and in India Rs. 44,265-1-10. Since then the Trustees of the Fund have made to the Bishop of Lucknow an annual payment of between £ 600 and £ 700 in London. There has been some variation in the amounts paid, due probably to variation in the yield of investments held by the Trustees of the Fund. The Trustees do not employ the Bishop, have no powers over him nor any share in his appointment. Each successive Bishop has received this annual allowance which has not been varied on account of any difference in personal circumstances, qualifications or conduct of the Bishops. No conditions are attached to the allowance, nor are any duties or any work required of the Bishop in return for the receipt of the allowance. The Bishop is free to utilize the allowance in any way he pleases. The allowance is and has always been paid in London. The payment is a payment to the Bishop personally but ceases from the date on which he vacates his office. The Colonial Bishopric Fund, is stated to be in the nature of a Charitable Fund, formed to assist Colonial Bishops, from which *ex gratia* payments are made, and the amount cannot be claimed by the recipient as payable in India as part of his salary or allowance.

4. In the assessments for 1929-30 and for 1930-31 the rupee equivalents of the sums received in the previous years namely Rs. 9060 and Rs. 8,893 were included in the assessable incomes. Appeals were filed and were unsuccessful. Copies of the appellate orders, of the application made under section 66 (2) and of an extract from a later letter received from the Bishop are in appendices A, B, and C respectively.*

5. In the opinion of the Commissioner the following questions of law arise:—

(*i*) Whether the sums received from the Colonial Bishopric Fund were income of the assessee within the meaning of section 3 of the Indian Income-tax Act?

(*ii*) Whether this income arose in British India?

(*iii*) Whether the tax on this income was payable under the head "Salaries" [section 7 (*i*)] or under the head "other sources", [section 12 (*i*)]?

6. The foregoing questions appear to cover the whole contention put forward by the Bishop, and to express it more accurately than the questions which he himself has framed.

7. No question is framed on the points made in paragraphs 8 and 9 of the application since the Assistant Commissioner did not hold, nor in the

*Not Printed.

opinion of the Commissioner could it be held, that the income, if it did not arise in British India, should be deemed to so arise.

8. The opinion of the Commissioner is as follows:—

Question (*i*).—No conditions were attached to the payment of the sums and the assessee was free to utilize them as he pleased. They were therefore part of the income of the assessee and the question should be answered in the affirmative.

Question (*ii*).—The income was received in the capacity of the Bishop of Lucknow, and would not have been received if the assessee had not been the Bishop of Lucknow. The See of Lucknow is a See in British India. Although the income was received and was receivable in London, the title to receive it arose from the occupation of an office held in British India. The income therefore arose in India and the question should be answered affirmatively.

Question (*iii*).—The Trustees attach no conditions to the annual payment of the income, nor do they demand the performance of any specified duties. None the less the payments are so intimately related to the performance of duties as the Bishop of Lucknow, that in the Commissioner's opinion the income was salary received by the assessee. The tax was therefore payable under the head "Salaries"

If, however, the income was not salary, it was still income to which the Indian Income-tax Act applies; and in that case the tax was payable under the head "other sources".

Desanges, for the Assessee.

The Government Advocate, for the Crown.

JUDGMENT.

This is a reference by the learned Commissioner of Income-tax under section 66 (2) of the Indian Income-tax Act in the matter of the Right Revd. C. J. G. Saunders, Lord Bishop of Lucknow.

The facts of the case are very short and simple. The Lord Bishop of Lucknow draws a salary from the Government of India. He also receives amount of money ranging from £ 600 to £ 700 a year, which is payable to him and which is paid to him in London. This income arises in this way. Certain subscriptions were raised both in India and in England, and a fund was created which is known as Colonial Bishopric Fund, London. The trustees of that fund make an allowance of the aforesaid sum (between £ 600 to £ 700 a year) to the Lord Bishop of Lucknow, who resides at Allahabad. The payment is gratutious, and no condition is attached to the payment, save this, that the payment has to be made to the person who for the time being fills in the character of the Lord Bishop of Lucknow.

The assessee, the Lord Bishop, has been taxed on an income which includes the sum that he received during the years 1929-1930 and 1930-1931. There were two assessments and there were two appeals by the Lord Bishop to the Assistant Commissioner of Income-tax. The appeals were rejected, and thereupon he asked the Commissioner of Income-tax to make the present reference.

The Commissioner of Income-tax has framed three questions, and they are as follows:—"(1) Whether the sums received from the Colonial Bishopric Fund were income of the assessee within the meaning of section 3 of the

Indian Income-tax Act? (2) Whether this income arose in British India? (3) Whether the tax on this income was payable under the head "salaries", [Section 7 (1)] or under the head "other sources", [Section 12 (1)]"?

The first question hardly needs any answer, because it is conceded on behalf of the assessee by his learned counsel, Mr. Desanges, that the allowance—we are using the word which the assessee himself used in his petition to the Commissioner of Income-tax made on the 17th January 1931,—is an income within the meaning of section 3 of the Indian Income-tax Act.

The third question is also very easy, and it is whether the allowance that is received is a "salary" within the meaning of section 7 of the Act, or is "an income from other sources" within the meaning of section 12. The definition of the word "salaries" is to be found in section 7 (1) of the Act, and it includes, among other things, any "fees and perquisites" received by the assessee in lieu of, or in addition to any salary or wages, or on behalf of any public body. The word "perquisites" is a very wide word, and its meaning, as given in Murray's English Dictionary, is as follows. "Any casual emolument, fee or profit attached to an office or position, in addition to salary or wages". In stating the facts, we have pointed out that the allowance is received by the assessee on account of his position as the Lord Bishop of Lucknow and not in his personal capacity. Thus the allowance does come within the term "salaries" and this is our answer to this question.

The second question is really a matter of first impression. Mr. Desanges has evidently devoted a good deal of time and labour to this case, and thanks to him we have been taken through a number of rulings as to the construction of section 4 (1). In our opinion, the facts of none of those cases approach near the facts of this case. What we have to see is whether the income that is sought to be taxed accrued or arose in British India. The three words "accruing", "arising" and "received" used in the section cannot have one and the same meaning. They must have been used in denoting different ideas. There can be no doubt that the allowance was not "received" in British India. The question is, did it "accrue" or "arise" in British India? In our opinion, it did. The reason is very simple, and it is this. If the assessee chooses to give up his appointment as Lord Bishop of Lucknow, and he further chooses to go back to England, will he get the income? The answer must be in the negative. It follows that the income accrues or arises on account of the assessee being in India, and in India alone. If that is so, we can safely say that the income accrues or arises in British India. The word "arise" according to Webster's International Dictionary means "spring up", "come into action, being or notice". The income is there in England, but it springs up or comes into action in India. But for the fact that the assessee holds a position in India, the income would not have come into action, would have laid dormant, and would not have been available to the assessee. The word "accrues" according to Murray's English Dictionary, means "to come by way of addition, increase, accession, or advantage." The money by way of allowance comes by way of addition, increase, accession or advantage in British India, not because it is received in British India, but because it becomes payable on account of the assessee being in British India. The moment he leaves British India the income is lost. That being so, we must hold and do hold that the income "accrues" or "arises" in British India.

Let a copy of this judgment be sent under the seal of the Court to the Commissioner of Income-tax. The assessee, having lost throughout, will pay

the costs of the Crown. We assess the fees of the Counsel for the Crown at Rs. 200. The Counsel for the Crown will certify within the allotted time.

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(463) IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice L. G. Mukerji and Mr. Justice Sen.

(23rd July, 1931.)

R. B. Seth Ganga Sagar Jatia .. *Assessee.*

v.

The Commissioner of Income-tax,

United Provinces.

Income-tax Act (XI of 1922), Secs. 10 and 66 (3)—Dewali and Holi expenses—Mali's pay—Deductability—Loss in shares, when capital loss.

Dewali and Holi expenses incurred in shop premises are not deductable as business expenses; nor is the pay of a Mali allowable as part of the cost of house repairs.

Loss incurred in sale of shares by an assessee not doing business in them is capital loss.

Application [Miscellaneous Case No. 587 of 1931] under Sec. 66 (3) of the Indian Income-tax Act (XI of 1922) for an order to direct the Commissioner of Income-tax, United Provinces, to state a case for the opinion of the Court.

JUDGMENT.

This is an application under section 66 (3) of the Income-tax Act, asking this Court to direct the Commissioner of Income-tax to state a case.

There is no affidavit in support of the application, but there is the order of the Assistant Commissioner and the order of the Income-tax Officer, and the facts of the case are tolerably clear.

The first point is that the assessee sold certain shares in the British India Corporation, and thereby suffered a loss in the sense that he got back less than what he had paid for those shares. It is claimed that this was a loss in business, and therefore the amount lost should have been deducted from the total income of his business.

It was argued that the applicant does business in shares, and therefore the shares were really his commodity, and the sale of commodity either brought a profit or loss, and in either case the amount gained or lost should have been taken into account. But the finding of the Commissioner of Income-tax is that the assessee does *not* do any business in shares. The finding is binding on us, and it follows, therefore, that the loss suffered is a loss in the capital, and not a loss in the business.

The second point is that a sum of Rs. 150 was paid as the pay of a Mali kept in a house, and the pay of the Mali should be deducted. No rule of law was referred to by the learned counsel, for the applicant, and we can-

not consider the pay of the Mali as a part of the cost of the repair of the house.

The third item of Rs. 75 has not been described at all in the application, nor is there any affidavit in support of the application. According to the order of the Assistant Commissioner of Income-tax, this sum of Rs. 75 consists of "Dewali" and "Holi" expenses incurred at Aligarh shops, and contains items such as cost of food taken by the assessee at the Aligarh shops. We do not see our way to hold that such expenses are, in any way, a part of the expenses of the business and are liable to be deducted out of the income.

The application fails, and is dismissed.

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[464] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

Before Sir George Rankin Kt., Chief Justice, Mr. Justice Pearson and Mr. Justice Ghose.

[21st July, 1931]

Messers Sadaram Puranchand .. *Assessees.*
v.
The Commissioner of Income-tax, Bengal .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 22 (2) & (3), 23 (3) & (4) & 66 (2)—Notice calling for accounts before return—Return filed but accounts not produced—Combined notice for evidence and accounts after return and assessment for default—Reasonable opportunity for production of evidence, when a question of law—Assessment to be made independent of default before return.

The assessees carrying on business in Calcutta, Cawnpore and Baghalpur called upon to make a return by 6th Sep. 1929 extended at their request to 20th October were refused a further extension and served with a notice under Sec. 22 (4) of the Income-tax Act on the 15th November for production of accounts on 16th December. On the 16th December, the assessees filed a return showing an income of Rs. 18,000 with an explanatory note that the accounts were under adjustment and would be completed in a month's time. Thereupon a combined notice under Secs. 22 (4) & 23 (2) was served on them on the afternoon of the 18th December calling for evidence and accounts at 11-30 A.M., on the 19th and the Income-tax Officer after rejecting their petition for another month's time as they had enough time before filing the return, made an assessment under Sec. 23 (4) on an income of Rs. 3,55,000. It was also found that all the accounts were in Calcutta from October till December and the assessees could have produced them, if they liked. On a reference to the High Court

HELD that the return filed on the 16th December having been accepted as a good return under Sec. 22 (3), the assessment made on the basis of a default to comply with the combined notice was invalid, as the assessees were not given reasonable opportunity to produce evidence and books in support of their return and that failure to produce books prior to submission of the return would not make them liable to be assessed independently of any evidence in support of their return or deprive them of the right to have the return duly and properly enquired into.

Whether an assessee was given reasonable opportunity to produce evidence in support of the return and whether the time given was so short as not to be reasonable are questions of law for reference to the High Court. . .

Case stated under Sec. 66 (3) of the Indian Income-tax Act by the Commissioner of Income-tax, Bengal in compliance with the order of the High Court requiring him to state a case for the opinion of the Court.

CASE.

The question which is being referred under section 66 (3) of the Income-tax Act, 1922 for the decision of the Hon'ble High Court in obedience to its order dated the 25th August, 1930, arises out of the assessment of Messrs. Sadaram Puranchand, hereinafter referred to as "the assessees", for the year of assessment, 1929-30.

The facts are as follows:—

A notice under section 22 (2) was served on the assessees on the 26th June, 1929, calling for a return of income of the previous year by the 6th September, 1929. On the 1st September, 1929, a petition was filed asking for one and a half months time on the ground that they had several branches in the mufussil and that their accounts had not yet been received at the head-office for adjustment. Time was allowed by the Income-tax Officer till the 20th October, 1929, and on the 19th October, 1929, another petition was filed asking for a month's time on the ground that the petitioners' account were totally posted but not balanced and adjusted on account of some Telpatfarak (discrepancy in the trial balance) of the branch accounts, and petitioners were unable to close the accounts in the meantime. On this the Income-tax Officer on the 15th November, 1929, called for accounts under section 22 (4) for the 16th December, 1929. On this date, however, a return was filed showing an income of Rs. 18,000 with a note "subject to adjustment". On receipt of this imperfect return, the Income-tax Officer issued a combined notice under section 22 (4) and 23 (2) on the 17th December, 1929, to produce evidence and accounts on the 19th December, 1929. This notice was not complied with and the Income-tax Officer finished the assessment under section 23 (4) on the 19th December, 1929, on an income which included the estimated incomes of the branches as reported by the Income-tax Officers, Cawnpore and Bhagalpur, in their reports of 24th August, 1929 and 15th September 1929 respectively. The assessees thereupon made application under section 27 to the Income-tax Officer and on this being rejected appealed to the Assistant Commissioner of Income-tax, under section 30. Being dissatisfied with their orders they then petitioned me under sections 33 and 66 (2) of the Act. I refused to interfere under section 33 and declined to state a case to the Hon'ble High Court under section 66 (2) as in my opinion all the so-called questions of law raised in the petition under section 66 (2) were really questions of fact.

The assessees then approached the Hon'ble High Court under section 66 (3) and the latter was pleased to order me to show cause. This my predecessor did in his letter dated the 6th August, 1930.

I have been asked by the Hon'ble High Court to state a case as to whether the Income-tax Officer was entitled to make an assessment under section 23 (4) of the Income-tax Act by reason of the assessees failing on

the 19th December, 1929, to comply with a notice of the 17th December, 1929, under sections 23 (2) and 22 (4), calling upon them to produce their books of account and adduce evidence in support of their return. I may notice in passing that the return filed on the 16th December, 1929, was not a return at all, being admittedly based on unadjusted accounts, and that the Income-tax Officer would have been within his rights in rejecting it and making an assessment under section 23 (4) for non-compliance with the notice under section 22 (4) issued by him on the 15th November, 1929, for production of accounts on the 16th December, 1929.

Assuming, however, for the sake of argument, that the acceptance of the return by the Income-tax Officer made it valid and gave the assessees the right to be served with a notice under section 23 (2), the question to be determined is whether the notice under sections 23 (2) and 22 (4) issued on the 17th December, 1929 and admittedly received by the assessees on the 18th December, 1929, at 3 p.m., gave them sufficient time for compliance. If the said notice had been the only one in question and if there were reason to believe that the assessees' books of account were not in Calcutta at the time, my opinion is that the notice would not have been sufficient. But in the first place a notice under section 22 (4) calling for exactly the same books as the notice in question called for was issued on the assessees on the 15th November, 1929, by registered post. The receipt of this notice is not denied, and it was clearly in response to it that the invalid return was filed on the 16th December, 1929, the date fixed in the notice for production of accounts. This notice of 15th November, 1929, falling due on the 16th December, 1929, gave the assessees ample time to collect their books of account from their branches and produce them for inspection. I find therefore that the assessees' books of account could and should have been in Calcutta and ready for production on the 17th December, 1929, the date on which the notice under sections 23 (2) and 22 (4) issued. It should therefore have been a matter of no difficulty to comply with the said notice inasmuch as the books of account would obviously have been the evidence on which the assessee relied in support of their return.

In these circumstances it appears to me that the Income-tax Officer was justified in assessing as he did under section 23 (4) for failure to comply with the notice under sections 23 (2) and 22 (4).

If, in addition to the above, there is a reasonable presumption that the assessees' books of account were actually in Calcutta at the time when the notice under sections 23 (2) and 22 (4) issued the case for the Income-tax Officer is still stronger.

The following facts have a definite bearing on this latter question:—

(1) On the 24th August, 1929, the Income-tax Officer, Cawnpore, in which city the assessees have got a branch business, reported that the assessees' representative informed him that the branch accounts had been sent to Calcutta.

(2) On the 15th September, 1929, the Income-tax Officer, Bhagalpur, where also the assessees have three branch businesses, reported that the assessees had filed a petition before him to say that the branch accounts were in Calcutta. I may note that he had submitted a similar report in 1926-27 and 1927-28.

(3) On the 6th September, 1929, assessees filed a petition before the Income-tax Officer, District IV (1), Calcutta, stating that their mofussil ac-

counts had not been received yet and asking for time till 21st October, 1929, to submit return. Time was allowed till the 19th October, 1929.

(4) On the 19th October, 1929, a second petition was filed before the Income-tax Officer saying that "the petitioners' accounts (have been) totally posted but not balanced and adjusted on account of some Telpatfarak (discrepancy in the trial balance) of the branch account," and asking for another month's time to file return.

(5) Though the above petition was rejected no action was taken till the 15th November, 1929, when notice under section 22 (4) issued.

(6) On the 19th December, 1929, a petition was filed before the Income-tax Officer asking for a month's time to comply with the notice under section 23 (2). In this it was stated that (*a*) the head office accounts were then at the assessees' native place (Bikanir) for settlement of certain disputed accounts, (*b*) the branch accouuts were lying at the branches where postings and totallings had been completed, (*c*) the return was submitted on instruction from the branches and (*d*) that final adjustments will be made at Calcutta early in January, 1930.

(7) In the petition under section 27 filed on the 2nd January 1930 it was said that the books were called for and adjusted during the holidays and nett profit ascertained.

The conclusions that I draw from the above facts are that on the 19th October, 1929, all the accounts were in Calcutta and were still in Calcutta on the 19th December, 1929. If the head office accounts were sent to Rajputana in July, 1929, as stated in the assessees' petition before the Hon'ble High Court, for collection of outstandings from debtors who had closed their businesses in Calcutta, why was this never mentioned in any of the petitions submitted to the Income-tax Officer before the 19th December, 1929. Moreover such a state of affairs would appear to be inconsistent with the assessees' statement in their petition of 19th October, 1929. Again we are asked to believe that in the interval between the 19th December, 1929 and 2nd January, 1930, the assessees recalled their head office accounts from Rajputana, collected their branch accounts from three centres in Bhagalpur and one in Cawnpore, adjusted them and ascertained the nett profit. That is to say that they effected more in some 12 days after the assessment was made than in the many months preceding the assessment.

I cannot believe this, and my final conclusion is that the assessees could have produced their books of account on the 16th December, 1929 and 19th December, 1929, if they had wished, but preferred to see what sort of an assessment would be made on them in the absence of accounts before producing them.

In the circumstances of the case the Income-tax Officer was, in my opinion, entitled to make the assessment under section 23 (4) of the Income-tax Act.

JUDGMENT.

RANKIN, C.J.:—The rule issued in this case has reference to the year of assessment 1929-30 and the year of account in the case of these as-

sessees was the Ramnavami year 1985. The assessees are an unregistered firm whose principal place of business is Calcutta but who have a branch in Cawnpore and three branches at Bhagalpur.

On the 26th of July, 1929, the Income-tax Officer, Calcutta, issued a notice under section 22 (2) of the Indian Income-tax Act, requiring the assessees to furnish by the 6th of September a return of their total income for the previous year. In September the assessees put in a petition to the effect that the accounts from their mofussil branches had not as yet been received and were given time up till the 20th of October to submit their return. In October they filed another petition asking for further time on the ground that their accounts had not yet been adjusted by reason of some discrepancies in the trial balance of their branch accounts. This petition was on the 25th of October rejected so that thereafter the assessees were in default in respect of their return. They had, however, the right given to them by section 22 (3) namely that they could furnish their return at any time before the assessment was made "and any return so made shall be deemed to be a return made in due time under this section." On the 15th of November, notice was given to the assessees under section 22 (4) requiring them to produce their books of account for Ramnavami 1985 on the 16th of December. The assessees, on the 16th of December, filed a return showing an income in the year of account of Rs. 18,000, with an explanatory note stating "The accounts are under adjustment and will be completed in a month's time."

The question before us is as to the correctness of the action taken by the Income-tax Officer upon receipt of this return. On the 16th of December, he recorded an order "Issue notice under sections 23 (2) and 22 (4) for evidence and accounts of the head office as well as all the branches and fix 19th December, 1929, at 11-30 a.m." On the following day the 17th, a combined notice under sections 23 (2) and 22 (4) was issued accordingly—that is to say, the assessees were called upon (1) to attend at the Income-tax Officer's office at 11-30 a.m. on the 19th, to produce or cause to be produced then and there any evidence on which they might rely in support of their return; and (2) at that time and place to produce or cause to be produced their books of account for the head office and the branches. This notice, though issued on the 17th, was not received by the assessee until 3 o'clock in the afternoon of the 18th. On the following day the assessees attended on the Income-tax Officer by their pleader and presented a petition asking for another month's time "to enable the petitioners to produce conclusive evidence of their previous year's income." This petition contained statements to the effect that the branch accounts were lying at the branches and that the return had been submitted "on obtaining instructions from branches and mofussil about the position of affairs." It stated also that the head office accounts were at the petitioners' native place for settlement of certain disputed accounts. The Income-tax Officer refused to give any further time saying that "no time can be allowed after submission of return for which the party already got enough time." He proceeded to make an assessment and assessed the assessees on the sum of Rs. 3,55,000.

The Rule issued by this Court calls upon the Commissioner of Income-tax to state a case on the following question:—"Whether the Income-tax Officer was entitled to make an assessment under section 23 (4) by reason of the petitioners failing on the 19th December last to comply with the notice of the 17th December last calling upon them to produce their books

of account and adduce evidence in support of the return dated the 16th December last."

From certain reports received from the Income-tax Officers at Cawnpore and Bhagalpur to the effect that the assessees' representatives were in August and September stating that the branch accounts were in Calcutta, and from the petitions presented to the Income-tax Officer in Calcutta on the 6th September and 19th October, the Commissioner of Income-tax draws the conclusion that from the 19th October to the 19th December all books of account were in Calcutta. He disbelieves the allegation that the Calcutta books had been sent to Rajaputana for collection of outstandings. His finding is that the assessees could have produced their books of account on the 16th of December, 1929, and the 19th of December, 1929, if they had wished; and he further infers and finds that they preferred to see what sort of an assessment would be made on them in the absence of accounts before producing them.

It is for the Commissioner, in stating a case, to find the facts and I accept the finding that the books both of the head office and branches were in Calcutta from October till December. This means that the assessees are shifty people, full of excuses and not minded to be either expeditious or straightforward. Even so, however, it is very necessary to see whether the Income-tax Officer had taken proper and reasonable steps to entitle him to make an assessment in default under section 23 (4). The default relied upon by the Income-tax Officer in his order of the 19th December was "default under section 23 (2) and 22 (4)." Whatever criticism may be passed upon the return filed on the 16th of December, it was a return; it was accepted as such; a notice under section 23 (2) was issued upon it and the default relied upon by the Income-tax Officer was not default in submitting a return. The assessees' return therefore having been made before assessment had to be treated as a return made in due time [c.f. section 22 (3)]. Before such a return could be disregarded, the assessees were entitled to a reasonable opportunity to produce any evidence upon which they might rely in support of the return. It is quite probable that their accounts were not in apple-pie order and in the return itself the assessees had stated that the accounts were still under adjustment. They were entitled to a reasonable opportunity not merely to collect and produce the books but to support or supplement their books by any other evidence on which they might rely.

Now, whether a notice received at 3 p.m. on the 18th requiring them to produce any evidence on which they might rely in support of their return on the 19th is a reasonable notice, affording the assessees proper opportunity to comply with its terms, is not, I think, a mere question of fact. Whether a given time is a reasonable time is no doubt a question of fact; but on the border line the question arises whether the time is not so short that it cannot be reasonable. Save upon very special facts, the time allowed in the present case is unreasonably short, if it be considered as an opportunity to the assessees to support their return in respect of a head office and four mofussil branches. The Income-tax Officer proceeded expressly upon default under section 23 (2) as well as section 22 (4). I am prepared to hold as a matter of law that he did not give to the assessees such reasonable opportunity as the Act requires to produce their evidence in support of their return.

It is said, however, that the Income-tax Officer was entitled to make an assessment in default by reason of the assessees' failure to comply with the requirement made under section 22 (4) that they should produce their

[465] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice L. G. Mukerji and Mr. Justice Sen

[27th July 1931]

Rai Bahadur Chotay Lal O. B. E. .. *Assessee.*
v.
The Commissioner of Income-tax,
United Provinces .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 23 (4) 34 & 55—Assessment as under Sec. 23 (4) as Hindu Joint family—Re-assessment under Sec. 34 as individual and super-tax assessed on Rs, 25,000—Legality—Income, if escaping assessment—Assess, Assessment, meaning of—Filing of return if cures original default—Limits of jurisdiction of the Income-tax Officer.

Where an assessment of super-tax had been completed as if the assessee were a Hindu undivided family and it was subsequently held that the assessee was an individual, the Income-tax Officer can proceed to assess to super-tax the Rs. 25,000 of the income as "assessed at too low a rate" but not "as escaped assessment" within the meaning of that section.

The words "assess" and "assessment" are used in the sense of determining or finding out the income of the assessee liable to be taxed.

Where in answer to a notice under Sec. 22 (2) read with Sec. 34 in respect of an original assessment made under Sec. 23 (4) for default of return, the assessee filed a return declaring a lesser income, it is not open to him to have the assessment reopened and his income determined de novo. *The filing of the return does not cure the default for which the original assessment was made and the whole assessment could not be considered or treated as one under Sec. 23 (3).*

Case[Miscellaneous Case No. 401 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

CASE.

1. The assessee is Rai Bahadur Chotay Lal, O.B.E., of Moradabad. On March 4, 1929, the assessee, having failed to make a return, was assessed under section 23 (4) of the Income-tax Act on an income of Rs. 1,14,546 for the year 1928-29. An application under section 27 was unsuccessful.

2. In this assessment the assessee was treated as a Hindu undivided family. Super-tax consequently was levied only on the amount by which the income exceeded Rs. 75,000. Subsequently it transpired that the assessee is an individual and not a Hindu undivided family and that in consequence super-tax should have been levied on the amount by which the income exceeded Rs. 50,000.

3. The Income-tax Officer, therefore, took action under section 34 and issued a notice under section 22 (2) on March 12, 1930. On April 22, 1930, the assessee filed a return showing an income of Rs. 85,487-12-7. The Income-tax Officer refused to reopen the assessment and on 6th October, 1930,

charged the assessee with the difference of the super-tax payable respectively by an individual and a Hindu undivided family enjoying the income already assessed, viz., Rs. 1,14,546.

4. The assessee appealed to the Assistant Commissioner who on January 19, 1931, rejected the appeal; whereupon on February 19, 1931, the assessee applied under section 66 (2) for the reference of his case to the High Court.

5. In the appendices* will be found copies of the original assessment order, the Income-tax Officer's order under section 27, the notice issued under section 34, the assessment order under section 34/55, the assessee's appeal, and the Assistant Commissioner's appellate order.

6. The assessee, who does not deny that he is an individual, has not formulated any question of law for reference; he has merely put forward five contentions as grounds of reference.

7. Of these contentions the first is quite general and raises no specific question of law. The fifth contends that the notice was illegal and imperfect; but as the Commissioner is unable to detect any illegality or imperfection therein and as the assessee has not indicated any, the Commissioner is unable to formulate any question of law on this contention.

8. The questions which apparently the assessee intends to raise by his second and third and fourth contentions may be stated thus:—

(i) Where an assessment of super-tax has been completed as if the assessee were a Hindu undivided family, and it is subsequently held that the assessee is an individual may the Income-tax Officer proceed under section 34 with a view to assessing to super-tax the Rs. 25,000 of income which has escaped that form of taxation?

(ii) In the circumstances stated in question (i) and where the original assessment was, in the absence of a return, made under section 23 (4) and the assessee in answer to the notice under section 22 (2)/34, files a return disclosing a lesser income than that taken in the original assessment, should the Income-tax Officer reopen the assessment and determine the assessee's income *de novo*, or should he confine himself to the assessment to super-tax of that portion of the income as determined in the original assessment which has escaped taxation?

(iii) In the circumstances stated in questions (i) and (ii) has the filing of the return in answer to the notice under section 22 (2)/34 the effect of curing the default for which the original assessment was made under section 23 (4) and should the whole assessment thereupon be treated as one made under section 23 (3)?

9. In the opinion of the Commissioner the foregoing questions should be answered as follows:—

Answer to question (i).—Section 58 applies section 34 to the assessment of super tax. In the case stated Rs. 25,000 was chargeable to super-

*Not printed.

tax and had escaped assessment. The conditions requisite for the use of section 34 were thus fulfilled, and it was the duty of the Income-tax Officer to proceed under that section.

Answer to question (ii).—It is not the intention of section 34 that when action is taken under that section the whole assessment should be re-opened and the assessee's total income determined afresh. In their judgment in *Seth Kasinath Bagla* v. *The Commissioner of Income-tax, United Provinces*[1] the Hon'ble Judges of the High Court held that the provisions of section 34 limit the action of the Income-tax authorities to the assessment of income which has previously escaped assessment or has been assessed at too low a rate. A similar view was taken by the Madras High Court in *P. L. Palaniappa Chettiar* v. *The Commissioner of Income-tax, Madras*.[2] In the present case the amount of the assessee's total income for the year 1928-29 had already been finally determined. Accordingly the Income-tax Officer had no power to re-determine the amount. His only duty was to impose super-tax on that portion of the already determined amount which had escaped assessment to super-tax.

Answer to question (iii). —The making of a return in response to a notice issued under section 22 (2) read with section 34 has not the effect of curing the default made in not making a return in response to the notice originally issued under section 22 (2), nor does it convert the original assessment made under section 23 (4) into one made under section 23 (3).

P. L. Banerji, for the Assessee.

Sankar Saran, (Government Advocate), for the Crown.

JUDGMENT.

This is a reference by the Commissioner of Income-tax made at the instance of one Rai Bahadur Chotay Lal, O.B.E., of Moradabad.

It appears that the assessee Rai Bahadur Lala Chotay Lal was assessed at an income of Rs. 1,14.546. In determining the tax payable by him he was taken to be a Hindu undivided family and for that reason the first Rs. 25,000 of his income, above the first Rs. 50,000, was not charged with any super-tax. The assessment was to the best of the judgment of the Income-tax Officer under section 23 (4) of the Income-tax Act. The assessee thereupon wanted to have the matter reviewed and he made an application under section 27 in which he stated that he was an individual and not the head of an undivided family. The Income-tax Officer thereupon found out his mistake for not charging any super-tax on a sum of Rs. 25,000.

The Income-tax Officer on the 12th of March, 1930, issued a notice under section 34 of the Income-tax Act read with section 58, and asked for a fresh return. The assessee made a return and stated that his income was Rs. 85,000 and odd. The Income-tax Officer being of opinion that the last assessment could not be reopened rejected the return and determined the super-tax payable on the sum of Rs. 25,000 over which no super-tax had been calculated. There was an appeal and subsequently there was an application to the Commissioner of Income-tax for the reference.

(1) 4 I. T. C. 472.
(2) 4 I. T. C. 196.

The Commissioner has framed the following questions for our determination:—

(1) Where an assessment of super-tax has been completed as if the assessee were a Hindu undivided family, and it is subsequently held that the assessee is an individual, may the Income-tax Officer proceed under section 34 with a view to assessing to super-tax the Rs. 25,000 of income which has escaped that form of taxation?

(2) In the circumstances stated in question (1) and where the original assessment was, in the absence of a return, made under section 23 (4) and the assessee in answer to the notice under section 22 (2)|34, files a return disclosing a lesser income than that taken in the original assessment, should the Income-tax Officer reopen the assessment and determine the assessee's income *de novo,* or should he confine himself to the assessment to super-tax of that portion of the income as determined in the original assessment which has escaped taxation?

(3) In the circumstances stated in questions (1) and (2) has the filing of the return in answer to the notice under section 22 (2)|34 the effect of curing the default for which the original assessment was made under section 23 (4) and should the whole assessment thereupon be treated as one made under section 23 (3)?

The first question is an important one and is whether section 34 is applicable to the circumstances of this case.

The Commissioner of Income-tax is of opinion that Rs. 25,000 was chargeable to super-tax and has "escaped assessment". It has been argued very eloquently on behalf of the assessee that this interpretation by the Income-tax Department is wrong and that no portion of the income of the assessee has "escaped assessment".

The argument of the learned counsel is based on the meaning of the words "assess" and "assessment" and he points out that the words "assess" and "assessment" have been used in section 23 of the Act in the sense of "finding out the total income of an assessee such income being liable to be taxed."

We have consulted Murray's English Dictionary and we find that the words "assess" and "assessment" have two meanings. The word "assess" means (1) "to settle, determine, or fix the amount of (taxation, or fine, etc.) to be paid by a person . . . ," (2) "to estimate officially the value of (property or income) for the purpose of apportioning its share of taxation." Similarly "assessment" has got two meanings corresponding to the two meanings quoted above of the word "assess".

The words "assess" and "assessment" being capable of being read in two senses, we ought to expect that the Income-tax Act has used the words "assessment" and "assess" in the same sense throughout. In section 23 (1), the words are:—"If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return." The word "assess" here has been used in the sense of finding out the total income of the assessee for the purpose of taxation. Again, in sub-section (3) of section 23, the following words appear "assess the total

income of the assessee, and determine the sum payable by him on the basis of such assessment." Evidently the words "assess" and "assessment" have been used in the same sense, namely, to determine the amount on which the tax is payable. Lastly in sub-section (4) there is the following expression "shall make the assessment to the best of his judgment." Here also the word "assessment" has been used in the sense of finding out the income of the assessee which may be liable to be taxed.

If we apply the meaning of the words "assess" and "assessment" which has been applied to section 23, we shall find that no portion of the income of Lala Chotay Lal has escaped assessment within the meaning of section 34 of the Income-tax Act. In other words, it cannot be said that any portion of the income of Lala Chotay Lal was not discovered as income liable to be taxed. In this view the ground on which the assessee was taxed again cannot hold water.

There is however another clause in section 34, which, in our opinion is applicable and it is this: "Or has been assessed at too low a rate."

The scheme of the Indian Finance Act of 1929 shows that in assessing super-tax, the income of the assessee is to be taken in two lots of Rs. 50,000. We have nothing to do with a company which comes under clause (1) of Part II of Schedule II. As regards individuals or families, etc., it is stated that the rate to be charged is "nil", in respect of every Hindu undivided family "in respect of the first twenty-five thousand rupees of the excess". In properly calculating the super-tax, the officer concerned will take, in the case of a Hindu undivided family, the first Rs. 25,000 in excess of the first Rs. 50,000 of the income, and calculate the rate of tax at the rate "nil". Then he will take the next Rs. 25,000 and will calculate the tax at one anna in the rupee and beyond the lot of Rs. 50,000 at the rate of 1½ annas in the rupee.

Thus calculating the amount of the income-tax, the rate to be applied to the first Rs. 25,000 over the first Rs. 50,000 of the income was "nil". In this view we can easily say that, not only within the spirit but within the letter of the words of section 34 of the Income-tax Act, a sum of Rs. 25,000 has been assessed "at too low a rate". We are therefore of opinion that the tax has been levied according to law. This is our answer to the first question.

The second question is whether the previous assessment can be reopened when a notice under section 34 is issued. This question although formulated before the Commissioner of Income-tax has not been pressed before us in view of the decision of this Court[1] where it was held that it was not open to the assessee to reopen the assessment.

The third question has also not been pressed. It is whether the issue of a fresh notice under section 34 does away with the previous assessment under section 23 (4) of the Income-tax Act. The answer is obviously in the negative. When it has been held that the previous assessment cannot be reopened by the fact that a fresh notice has been issued for the determination of the amount which has escaped assessment or has been assessed at too low a rate, it is not open to the assessee to say that the whole assessment should be reconsidered.

(1) *Seth Kasinath Bagla* v. *The Commissioner of Income-tax, United Provinces*, 4 I. T. C. 472.

We direct that a copy of this judgment be sent to the Commissioner of Income-tax under the seal of the Court and that the assessee do pay the costs of this assessment to the Crown. The fees payable to the Government Advocate are assessed at Rs. 150 and he will certify payment during the usual period allowed to him.

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[466] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice Mukerji and Mr. Justice Sen.

[27th July, 1931].

Messers. Mayaram Durga Prasad .. *Assessees.*

v.

The Commissioner of Income-tax, United Provinces .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 28 (1) & 34—Proceedings for assessing escaped income—Assessee showing real income in later return in Sec. 34 proceedings—Income concealed in first return—Penalty, levy of, if valid.

Where an assessee orginally assessed on the basis of a return stating his income below its real amount subsequently showed his income at the correct figure in the return filed by him on service of a notice under Sec. 22 (2) of the Income-tax Act in the proceedings taken under Sec. 34 and the Income-tax Officer accepting the figures in the later return assessed him accordingly, no penalty can be levied under Sec. 28 (1) in respect of the concealment of income in the first return.

Case [Miscellaneous Case No. 490 of 1931] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces for the opinion of the High Court.

CASE.

The assessee is an unregistered firm styled Mayaram Durga Prasad.

2. For the year 1929-30 the assessee returned his income in the previous year at Rs. 2,650. The return was accepted and assessment was made accordingly without examination of accounts.

3. In June, 1930, the Income-tax Officer who made this assessment was transferred. Acting on information received the new Income-tax Officer took action under section 34 and called for a fresh return of income by August 19, 1930.

4. The return called for was not filed on due date. The Income-tax Officer then called for books of account which were produced on September 19. It appears that the assessee on this date requested the Income-tax Officer to examine the books and ascertain the assessee's total income so that he might file a return accordingly.

5. The Income-tax Officer accepted the proposal and calculated the taxable income to be Rs. 38,327. In the course of his examination the Income-

tax Officer discovered two profit and loss accounts. In the one the profit shown was Rs. 525. In the other the profit shown was Rs. 28,446. The adding back of inadmissible items of expenditure totalling Rs. 9,356 raised the total income to Rs. 38,327. The assessee thereon filed a return disclosing his income at Rs. 38,327; the assessment was made accordingly, and the tax payable fixed at Rs. 2,925-5-0.

6. The Income-tax Officer also examined the accounts relevant to the assessment for 1928-29 although in respect of that assessment action under section 34 was no longer possible. He found that an income of Rs. 2,333 had been returned and accepted without examination of accounts, while the books disclosed an income of over Rs. 21,000.

7. The Income-tax Officer took action under section 28 in respect of the return originally filed for the assessment for 1929-30 and imposed a penalty of Rs. 2,900.

8. The assessee appealed to the Assistant Commissioner who rejected the appeal.

9. The assessee has now applied under section 66 for a statement of the case to the High Court.

10. Copies of the original assessment order, of the assessment order under section 34, of the order under section 28, of the appeal, of the Assistant Commissioner's appellate order and of the application under section 66 are given as appendices A, B, C, D, E and F respectively.*

11. The application states that two points of law arise. They are not framed in the form of questions.

12. The Commissioner heard counsel on behalf of the assessee. The second "point of law" was withdrawn as being a question of fact, namely, whether concealment was proved.

13. The question of law arising on the first point may be stated as follows:—

> "When an assessee in answer to an original notice under section 22 (2) has returned his income below its real amount and has been assessed accordingly, and later in reply to a notice under section 22 (2) |34 returns his income at the correct figure, is the imposition of a penalty in respect of the concealment of income in the former return authorised by sub-section (1) of section 28?"

This question is accordingly referred to the High Court.

Opinion of the Commissioner

14. The position taken by the assessee, so far as the Commissioner understands it, is, firstly, that the expression "in the course of any proceeding under this Act" in section 28 (i) means in the course of the proceedings which terminate in the assessment. In this case the assessment terminating the proceedings was the original assessment on an income of Rs. 2,650. With the passing of that order all power to make use of section 28 ceased in respect of the return which resulted in that assessment.

* Not printed.

This argument may be ingenious, but in the Commissioner's opinion is not warranted by anything in section 28. The expression "in the course of any proceeding under this Act" is a very wide one; it could hardly be wider. Nor is there anything in the words that follow which in any way links the concealment of income with the proceedings in the course of which the Income-tax Officer takes action. In the Commissioner's opinion the proceedings in which action is taken may be quite distinct from the proceedings in which income was concealed.

The assessee's second line of argument is understood to be that the ultimate making of a correct return cured the falsity of the return originally made. The Commissioner concedes that repentance may be a ground for condoning a past offence; but repentance cannot in his opinion make the act constitutng the offence other than it was at the time the act was done.

The Commissioner considers that the question should be answered affirmatively.

JUDGMENT.

This is a reference under the Income-tax Act, section 66 (2), by the Commissioner of Income-tax, United Provinces, under the following circumstances.

The assessee is an unregistered firm styled Mayaram Durga Prasad. It had to be assessed with income-tax in the year 1929-30. For the purposes of taxation it was asked to state its income in a return, and it did send in one. It showed the amount of its income as Rs. 2,650.. This return was accepted, and a tax was determined accordingly. The officer who had accepted the return was transferred, and his successor discovered that the assessee had a much larger income and thereupon he took proceedings under section 34 of the Income-tax Act. The assessee was called upon to make a fresh return. This time, it made a return showing an income at the figure Rs. 38,327. The Income-tax Officer accepted the figures submitted, and determined the tax payable on the basis of these figures.

Being of opinion that the previous return was made deliberately in order to escape payment of just and proper tax, the Income-tax Officer inflicted a penalty of Rs. 2,900 on the assessee. The amount was the difference between the tax which was subsequently determined and the tax which had been previously determined. There was an appeal. The appeal having been dismissed, the Commissioner was requested to submit a case and this is the case before us.

The contention on behalf of the assessee is that its case does not fall within the purview of section 28, which is the rule for inflicting the penalty on an assessee.

The sub-section of section 28 is the only relevant rule for our purposes. It can be split up into several portions, and unless each and every portion is applicable to the facts of a particular case, it would not be possible for the Income-tax Officer to levy a penalty.

The ingredients which go to make up the conditions precedent to the infliction of a penalty are: (1) The Income-tax Officer, in the course of a proceeding, must be satisfied that an assessee has deliberately fu nished in-

accurate particulars of his income, and has thereby returned it below the real amount; (2) There must be a determination by the Income-tax Officer that the assessee has furnished inaccurate particulars of the income; and (3) a refusal on the part of the taxing officer to accept the income returned, as correct. In this particular case the return of income submitted has been accepted as correct and has formed the basis of the taxation. Again, there is no independent enquiry by the Income-tax Officer as to the income of the assessee, and there is, therefore, nothing to show that a concealment has been attempted at. The proceedings, which terminated on the assessment of the income at the figure Rs. 2,650 were no longer before the Income-tax Officer. The Income-tax Officer started fresh proceedings for the assessment of the income that had escaped assessment under section 34 of the Income-tax Act. It has been held by this Court that when proceedings are taken under section 34 of the Indian Income-tax Act, it is not open to the assessee to show that he should have been assessed at a lower figure of income than was the case, before the proceedings under section 34 were started. The reason given was that the fresh proceedings were meant to assess the escaped income, and not to assess the income which had already been assessed. See *Seth Kasinath Bagla* v. *Commissioner of Income-tax, United Provinces.*[1]

In our opinion, the proceedings which terminated with the assessment of the income at the figure of Rs. 2,650 are proceedings distinct from the proceedings under section 34 of the Income-tax Act. That being so, it cannot be said that the assessee "has concealed the particulars of his income or has furnished inaccurate particulars of such income." If the two proceedings are separate, a reference to the previous proceedings can be made only by the use of the verb "to have" in the past tense, and not by the use of the verb in the present tense.

The result of our examination of the law is that none of the ingredients necessary to bring the case within the purview of sub-section (1) of section 28 exist in this case, and the levy of the penalty was wrong in law.

We direct that a copy of this judgment under the seal of the Court be sent to the Commissioner of Income-tax, for information. The Crown must pay the costs of the assessee for the present proceedings. We assess the fee of the learned counsel for the assessee at Rs. 100 and the same amount as the fee for the learned Government Advocate.

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[467] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Before Mr. Justice Mukerji and Mr. Justice Sen

[31st July 1931]

Shiamlal and others — *Assessees.*

v.

The Commissioner of Income-tax, United Provinces.

Income-tax Act (XI of 1922), Secs. 30, 66 (2) & (3)—Hindu joint family—Non-assessment to tax—Appeal, if lies—Claim of exemption from tax as partners—Reference to High Court, maintainability.

(1) 4 I. T. C. 472.

A Hindu joint family owning in addition to the family business shares in partnerships with strangers was not assessed to tax as having suffered a loss in the family business, but its claim for exemption from taxes payable as partners of the firms was refused. After an unsuccessful appeal to the Assistant Commissioner against this rejection and an application to the Commissioner for reference to the High Court an application was made under Sec. 66 (3) of the Income-tax Act to the High Court.

HELD that there being no assessment to income-tax, no appeal lay to the Assistant Commissioner under Sec. 30 of the Act and consequently no application for a reference under Sec. 66 (3) lay to the High Court.

JUDGMENT.

There is nothing in this application. The Court was induced to issue notice because the facts stated were not quite clearly represented.

It appears that there is a Hindu family consisting of several members of which four have been treated as the heads of the family, namely, Shiamlal, Bansidhar, Ajudhia Pd. and Chunni Lal. The family has its own business and besides own shares in certain partnership ventures consisting of cotton presses and ginning factories at Dibia, Khurja, Aligarh and Kosi. These firms did not belong exclusively to the undivided family already mentioned but belonged to the undivided family and several other persons who were partners in the firms.

The family in its business suffered a loss and accordingly was not at all taxed. But the family were not satisfied with this and they wanted that they should be exempted from the taxes that they had to pay as members of the firms already mentioned.

The Income-tax Officer contented himself with making no assessment of tax on the family. An appeal was taken to the Assistant Commissioner and he said that the family were not entitled to any benefit owing to the fact that they had suffered a loss in their personal family business while there was no income in the presses.

The assessees went up to the Commissioner who held that he was not bound to make a reference because there was no proper appeal before the Assistant Commissioner and it was a condition precedent to a reference that there should be an appeal to the Assistant Commissioner.

Section 30 of the Income-tax Act allows a right of appeal only when there is an assessment to tax. As there was no assessment of tax no appeal lay to the Assistant Commissioner and therefore there could be no reference to this Court.

We need express no opinion on the merits because there is no reference before us and there is no case in which we should ask for a reference. We accordingly dismiss the application with costs. The Government Advocate is declared to be entitled to a fee of Rs. 100 receipt of which he will certify in due course.

[468] IN THE HIGH COURT OF JUDICATURE AT BENGAL

Before Sir C. C. Ghose Kt., Acting Chief Justice, Mr. Justice Pearson and Mr. Justice Mukerjee.

[17th August 1931]

Messrs. Baldeodas Rameswar .. *Assessees.*

v.

The Commissioner of Income-tax, Bengal .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs.23 (4), 34 & 66 (3)—Assessment on actual income—Prior assessment under Secs. 23 (4) & 34—Accrued interest, set off of, as bad debts—Claim rejected as not proved—Non-production of accounts.

On an assessment to income-tax for 1926-27 on the actual income of the previous year St. 1981-82 without taking into consideration accrued interest, the assessees claimed a set off of a large sum of money being the principal amount of debts and accrued interest thereon as bad debts. It was contended that the assessment for the previous year 1925-26 having been made under Secs. 23 (4) & 34 of the Income-tax Act, it must be taken that all income which had accrued and escaped assessment had been assessed to tax and that accrued interest was taken into consideration in the said assessment, but the books for St. 1980-81 were not produced. The Income-tax Officer disallowed the claim as not proved. On a reference to the High Court,

HELD that the assessees having failed to produce any materials in support of their contention that the sums of money representing interest had not been recovered or got in at any time, the claim was rightly disallowed.

CASE.

The questions of law, hereinafter stated, which are being referred for the decision of the Hon'ble High Court under section 66 (3) of the Indian Income-tax Act (XI of 1922), arise out of the assessment of Messrs. Baldeodas Rameswar, hereinafter referred to as "the assessees", for the year of assessment 1926-27.

The facts are as follows:—

The assessees are a Hindu undivided family carrying on business in Calcutta in share dealing, share broking, hessians and jute speculation. They have also income from dividends and property. They use the mercantile system of accountancy and keep the Dewali year as their year of account. In the assessments prior to the assessment in question, *viz.*, 1926-27, they never produced their books of account and their income was uniformly computed on estimate under the provisions of section 23 (4) of the Indian Income-tax Act. In the assessment for 1926-27, in response to a notice under section 22 (2), they submitted return showing a loss of Rs. 3,53,017 in the year of account 1981-82 Dewali (corresponding to the period 27th October, 1924, to the 17th October, 1925) which year was their previous year, as defined in section 2 (11) of the Act, for the assessment in question. The Income-tax Officer did not accept the return as correct, but issued a notice under section 23 (2) requiring production of all evidence relied on in sup-

port of the return. In response the assessees produced the following books:—

(*a*) Sowda or day book, Rokar (cash book), Nakal (Journal) and Ledger for 1981-82 D (the previous year).

(*b*) Ledger (1st Volume), Rokar, Nakal for 1979-80 D.

(*c*) Ledger (1st Volume) for 1978-79 D.

(*d*) Nakal for 1975-76 D.

(*e*) Ledger, Rokar and Nakal for 1977-78 D. of their business in the name of Rameswar Nathani and Company.

No accounts whatsoever for 1980-81 Dewali were produced. The ledgers for 1978-79 Dewali and 1979-80 Dewali as produced did not contain the nominal accounts, the Profit and Loss Account or the Naya Bahi (balance sheet). Besides, the Income-tax Officer was informed by the representative of the assessees that there were other volumes of each of these two years which were missing. After inspection of the above books, the Income-tax Officer, after setting off a loss in business of Rs. 17,75,040, made the assessment under section 23 (3) on a total income of Rs. 8,00,755. Only the questions arising out of the computation of the loss in business are in issue in this statement.

3. Firstly, in the books of the previous year (1981-82 Dewali) a debt amounting to Rs. 4,80,373 standing in the name of one Bhajanlal Mahadeo had been written off as bad. This debtor had been declared insolvent on the 7th May, 1923, some five months before the close of the year of account 1979-80 Dewali. It was well known at the time of declaration of insolvency that the debtor had no assets. Moreover, at least one assessee of the same district had written off a debt due from this same person as bad in the accounts of 1979-80 Dewali, *i.e.*, no less than two years previously. In the assessment proceedings for the year of assessment (1925-26) immediately preceding the year of assessment now in question, the previous year of which assessment was the year of account 1980-81 Dewali, the assessees had submitted a statement of account (they failed to produce their books in connection with that assessment) in which statement they had claimed set off against the profits of 1980-81 Dewali of this same bad debt. On the above facts the Income-tax Officer held that the debt in question had become bad prior to the beginning of the previous year now in question (1981-82 Dewali) and could not be allowed as set off against the profits of that year. He seems, however, to have assumed that the bad debt had not been allowed in the 1925-26 assessment for lack of evidence. I find, however, no warrant for this assumption in the assessment note for 1925-26, either in the original assessment for that year or in the assessment as subsequently revised under section 34, both of which assessments were made under section 23 (4) on a total income computed by general estimate in complete absence of the books of account of the previous year (1980-81 Dewali), so that the question of the allowance or disallowance of any particular bad debt did not arise. The assessees appealed against the disallowance to the Assistant Commissioner, who upheld the decision of the Income-tax Officer.

4. Secondly, the assessees in the books of the previous year had written off three bad debts owing to them respectively by D. Mackenzie, Bairanglal Chaudhury and Mansukrai Pannalal. These debts represented differences in share transactions and the accumulated interest thereon. The Income-tax Officer allowed set off against profits of the principal sum in each

case, but he disallowed set off of interest in all these cases on the ground that the interest had not been assessed and taxed in former years. The interest thereby disallowable was calculated by the Income-tax Officer to amount in sum to Rs. 2,51,955-11. As has been stated above, the assessees in connection with the assessments of former years had never produced their books of account and had uniformly been assessed on estimate under section 23 (4). They had never revealed at any former assessment the accrual of any portion of this interest. The assessees, objecting to the disallowance, put forward, among other contentions, that set off must be allowed whether or not the sums of interest in question or any portion of them had been assessed and taxed in former years. This contention was disallowed by the Income-tax Officer, as well as their other contentions. They appealed to the Assistant Commissioner on this second point also. Before the Assistant Commissioner they did not challenge the ruling of the Income-tax Officer that set off of interest could not be allowed unless the interest had been assessed in former years, but attempted to show that the said interest had actually been assessed in former years. The Assistant Commissioner decided the point against them.

5. The assessees thereupon filed a combined application under sections 33 and 66 (2) in respect of the disallowance of the above claims. It may here be noted that both that application and the appeal petition covered certain other points, reference to which is here omitted as they are not in issue. My predecessor refused to modify the assessment under section 33 in respect of either claim. He also refused to refer to the Hon'ble High Court the two questions, purporting to be questions of law, framed by the assessees in relation to the two claims, holding that both questions were questions of fact. The assessees applied to the Hon'ble High Court under section 66 (3). I expressed the view that both questions were questions of law, and the Hon'ble Court ordered me to state the case which is now being stated.

6. The questions framed by the assessees in their application under section 66 (2) included a statement of the facts and arguments in each case. I omit to reproduce the questions here on account of their length. Moreover they were unsuitably framed for reference. For instance, the question drawn up in respect of the first claim for set off of the bad debt of Bhajanlal Mahadeo set out that, since in the assessment for 1925-26, set off was disallowed because no evidence was forthcoming that the debt had been written off in the books of 1980-81 Dewali, the assessing officer was bound to allow the set off in the assessment for 1926-27, when the books of 1981-82 Dewali produced showed that the debt had been written off in the latter year. The hypothesis is incorrect, as I have shown in paragraph 3 above, and the argument is fallacious on the face of it. So also the question framed in regard to the second claim contained in the following argument which is based on a misconception of fact:—"If such interest had really escaped assessment, such escapement fell within the purview of section 34 proceedings for 1925-26, which was (*sic*) pending when the assessment for 1926-27 was being made under section 23 (3) and not within the competency of an Income-tax Officer making an original assessment under section 23 (3) for 1926-27." In point of fact it could not be said that the Income-tax Officer, in disallowing the claim for set off against profits of the amount of interest in question for lack of proof that the claim was maintainable, was actually assessing that interest.

7. The questions were alternatively framed in the application under section 66 (3) as follows:—

"(*a*) Is the Income-tax Officer legally entitled to disallow the bad debt of Rs. 4,80,373 on the ground that the same had proved bad in the previous year, although the assessee wrote off the same as bad debt in the assessment year in question, and although in the previous year the assessee had reasonable expectation to receive some payment from the debtor.

(*b*) Is the Income-tax Officer legally entitled to disallow the claim for interest in view of the fact that the assessee had been assessed in the previous year under section 23 (4) of the Act and under section 34 of the Act in which income and all income which had escaped assessment in the opinion of the Income-tax Officer were assessed including income from interest on bad debts which proved bad?"

These questions are therefore due to be dealt with.

8. It will be observed that in neither question as framed does the term "previous year" bear the particular meaning of the term as used in the Act and as elsewhere employed in this statement. In question (*a*) the term connotes the year of account preceding the previous year (as defined in section 2 (11) of the Act) for the assessment now in question, while in question (*b*) the same term is used to mean the year of assessment preceding the year of assessment now in question.

9. First in regard to question (*a*). This question as framed improperly limits the facts. It is true that the assessees wrote off the debt as bad in the books of the previous year (1981-82 Dewali) on the profits of which the assessment now in question was made, but they failed to demonstrate that they had not also previously written off the same debt as bad in the books of the year of account preceding that year, *viz.*, 1980-81 Dewali. As previously mentioned they claimed the debt in question as bad in a statement of account submitted in connection with the assessment for 1925-26 based on the profits of the year of account 1980-81 Dewali. That they had actually written off the debt as bad in the books of 1980-81 Dewali is a reasonable inference from this fact. The onus was on the assessees to discharge this presumption by producing the books of 1980-81 Dewali, but, as previously stated, they failed to produce those books either in connection with the assessment for 1925-26 or in connection with the assessment for 1926-27. Had they actually so written off the debt in the books of 1980-81 Dewali, it would have been an easy matter to restore the debt in those books by a subsequent reverse entry in order to enable the debt to be carried forward to the books of 1981-82 Dewali and again written off in that year. Whether the debt was actually written off in the books of 1980-81 Dewali is a question of fact, and, in view of the failure of the assessees to produce the books of 1980-81 Dewali I hold that it was so written off. A further objection to the wording of question (*a*) is that it is incorrectly set down in the question that there was reasonable expectation of payment in the "previous year", meaning the year of account 1980-81 Dewali. As I found in paragraph 3 above, it was well known on the exchange as early as 1979-80 Dewali, in fact five months before the close of that year, that the insolvent had practically no assets, and that there was no reasonable expectation of any dividend. The assessees themselves admitted this by claiming the debt as bad in the assessment for 1925-26. They cannot now be allowed to go back on that admission. Moreover, that in point of fact no dividend was actually declared by the Official Assignee must be presumed from the fact that the

assessees have not shown any credit in their books on that account. Doubtless the assessees could have ascertained as early as 1979-80 D by enquiring from the Official Assignee that there would be no dividend. I, therefore, hold as a fact that, at least well before the end of the year of account (1980-81) preceding the previous year for the assessment in question, the assessees knew that there was no reasonable expectation of any recovery on the debt standing in the name of Bhajanlal Mahadeo.

10. It appears to me that the question of law arising out of the facts may conveniently be stated as follows:—

> "Was there evidence before the Income-tax Officer on which he should have allowed set off of the bad debt standing in the name of Bhajanlal Mahadeo?"

This question is therefore referred as question (*c*).

11. My opinion on this question is as follows:--

> I have held above in paragraph 9 of this statement both that the debt was bad before the end of the year of account 1980-81 Dewali, and that it was actually written off in the books of that year. On these facts the answer to the question is in the negative, in my opinion.

12. Question (*b*) is obscure. The contention of the assessees is plainly seen from the wording of the question to be that the sums of interest in question could not be said to have been unassessed in the assessments of former years inasmuch as the assessment for 1925-26 had been made under section 23 (4), an assessment under which sub-section is intended to include all profits of whatever kind accruing or arising. That such is the contention of the assessees is corroborated by reference to the question as framed in the application under section 66 (2). The allusion to section 34 is obscure to me. Whether the assessment for 1925-26 was made under section 34 or not can make no difference to the present issue, so far as I can see. The intention of the assessees perhaps is that, inasmuch as the assessment was made under section 34, the Income-tax Officer must be presumed in terms of that section to have assessed all income which had escaped assessment. Clearly, however, there can be no such presumption. An additional contention is to be gathered from the question as originally framed in the application under section 66 (2), in which it was pointed out that the Income-tax Officer made the revised assessment under section 34 for 1925-26 simultaneously with the assessment for 1926-27 now in question, so that he was aware, when he made the former assessment, that the sums of interest in question were due for assessment. It is a fact that the assessments were made on one and the same day. Which of the two assessments was the earlier made is not apparent from the record. It should be observed that neither under sub-section (2) or under sub-section (3) of section 66, have the assessees raised the contention that the interest in question was due to be allowed as set off, whether or not it had been assessed and taxed in former years. Neither did they raise this question in appeal, so that the question does not arise out of the appellate order and cannot be referred to the Hon'ble High Court under the terms of section 66 (3).

13. But, even if the assessees succeed in their contention, they will merely have established that such portion only of the total sum of interest

in question as accrued in the year 1980-81 Dewali had been assessed and taxed prior to the year of assessment in question. What was the amount of this portion? The books of 1978-79 Dewali and 1979-80 Dewali produced showed, as is clear from the assessment note, *nil* interest actually charged against both Bajranlal Chaudhury and Mansukrai Pannalal. It is a certain inference that no interest on the debt of either was charged in 1980-81 Dewali. Only in the case of the debt standing in the name of D. Mackenzie was interest charged in the books of 1981-82 Dewali amounting to Rs. 63,898-3. Probably therefore, a somewhat similar amount might be presumed to have been credited in the books of 1980-81 Dewali and therefore to have accrued and been assessable in 1925-26. The remainder of the interest beyond all doubt accrued before 1980-81 Dewali. The contention of the assessees, therefore, narrows itself down to this, that the Income-tax Officer knew, or ought to have known, when he made the revised assessment for 1925-26 under section 34, that a sum of approximately Rs. 60,000 was due to be assessed in that year as credited interest on the debt standing in the name of D. Mackenzie and must therefore be presumed to have included this sum in the assessment for 1925-26 made under section 23 (4), so that such an amount at least should have been allowed as set off against profits in the assessment for 1926-27 now in question.

14. It seems to me that the question of law which covers both the facts and the contentions of the assessees is this:—"Was there evidence before the Income-tax Officer on which he should have held that the said sums of interest, or any part of them, had been included in the total income computed in the assessment of 1925-26?"

15. This question would ordinarily be a question of fact, but, in the peculiar circumstances of this case, I consider that the question may fairly be held to be a question of law and I therefore refer it as question (*d*).

16. The facts in regard to this question and my opinion thereon, are as follows:—

As is plain from the assessment note, the Income-tax Officer, in estimating the total income of the assessees under section 23 (4) for the year 1925-26, never took into consideration either this particular sum of approximately Rs. 60,000 or any other particular sum. Its accrual was plainly out of his recollection at the time. Nor can it with reason be argued that such a general estimate as he made must be presumed to have included this particular sum, when it failed to include a large portion of the actual income of the assessees in that year, as will be clear from the following:—In the year 1980-81 Dewali, the jute market was exceedingly favourable. The transactions of the assessees in jute speculation are on the largest scale. Their persistency in withholding their books of that year points beyond all doubt to the conclusion that they were successful in that year beyond the average. The opening balance of capital in the books of 1981-82 Dewali exceeded the closing balance of capital in the books of 1979-80 Dewali by no less than 35 lakhs of rupees. That the difference represented profit of successful speculation in 1980-81 Dewali is at least not an unreasonable inference, in default of any other explanation and none such has been forthcoming, and also in view of the common talk in Calcutta that the assessees made such large profits both in the year 1980-81 Dewali and in the years preceding that year that they possessed sufficient funds subsequently to attempt the cornering of a portion of the Calcutta market. In view of the withholding of the books such considerations as the above assume weight. But the

estimate of the Income-tax Officer for the income derived from property and business combined was only two lacs of rupees. Again the income of the assessees derived from dividends alone was estimated in 1926-27 at nearly 26 lacs of rupees. It may confidently be inferred that a somewhat similar income accrued to them in the year immediately preceding that year, since income from dividends is generally constant. And yet, in the face of this obvious inference, the Income-tax Officer estimated an income of ten lakhs only from dividends in 1925-26. It would be absurd to argue that the whole of this income of nearly 26 lakhs was included in the 10 lakhs actually assessed. For these reasons it appears to me plain that neither the said sum of Rs. 60,000 or any part of it could rightly be said to have been included in the assessment for 1925-26. And, even if it was so included, the duty of the assessees was to demonstrate the fact clearly before the Income-tax Officer, when they made their claim for set off in 1926-27, since any assessee who makes a claim for set off against profits is under an obligation to produce evidence in support of his claim. But the assessees neither put forward their claim fairly or properly nor, in view of the withholding of the books of 1980-81 Dewali could it be said that they produced anything but the most unsatisfactory evidence in support of their claim.

17. For these reasons in my opinion, the answer to question (*d*) is in the negative.

JUDGMENT.

On the 13th of May 1930, a petition was presented to this Court praying for an order that the Commissioner of Income-tax who is the opposite party in these proceedings might be directed to state a case under section 66 (3) of the Income-tax Act (XI of 1922) for the opinion of this Court on the two questions set out in the petition, namely (1) "Whether the learned Assistant Commissioner was justified in upholding the decisions of the Income-tax Officer in disallowing the bad debt of Bhajanlal Mahadeo amounting to Rs. 4,80,373-15-0 in the circumstances as stated in sub-paragraphs (iii) and (iv) of paragraph 6 of the petition under section 66 (2) to the Commissioner, or, in other words, is the Income-tax Officer legally entitled to disallow the bad debt of Rs. 4,80,373 on the ground that the same had proved bad in the previous year although the assessee wrote off the same as bad debt in the assessment year in question and although in the previous year the assessee had reasonable expectation to receive some payment from the Official Assignee?" and (2) "Whether the learned Assistant Commissioner was justified in law in upholding the decision of the Income-tax Officer in adding back a sum of Rs. 2,51,955-11-0 as unassessed interest under the circumstances as delineated in sub-para (v) of paragraph 6 of the petition; or in other words, is the Income-tax Officer legally entitled to disallow the claim for interest in view of the fact that the assessee had been assessed in the previous year under section 23 (4) of the Act and under section 34 of the Act in which income and all income which had escaped assessment in the opinion of the Income-tax Officer were assessed including income from interest on debts which proved bad?" Upon that petition, an order was made by this Court on the 25th August 1930 requiring the opposite party to state a case before this Court for its opinion with his own opinion on the said questions. That has now been done and the reference by the opposite party has come on for hearing.

As regards the first of the questions referred to above, nothing need be said because Mr. Banerji who appears for the assessees has stated be-

fore us specifically that he does not propose to press that question. It is the second question which Mr. Banerji has pressed upon our attention and it appears to us after hearing arguments on both sides that the facts are as follows: The assessees have been assessed to income-tax for the year 1926-27. The details of that assessment appear on page 7 of the paper book. That assessment was in respect of the income during the accounting year 1981-82 Dewali and it appears that, in making the assessment for 1926-27, the actual income of the accounting year 1981-82 Dewali alone was taken into consideration and there was no tax assessed on interest which accrued during the accounting year. The assessees claimed set off in respect of a large sum of money which, according to them, represented bad debts. These alleged bad debts consisted of several items. The Income-tax Officer disallowed the items referred to in question (1) on the ground that the same became bad long before the accounting year. As regards the other items, he allowed set off in respect of the principal amount only and disallowed the claim to set off in respect of the sum of Rs. 2,51,955-11-0 which represented the interest on the principal amount of those debts. The assessees were dissatisfied with the assessment for the year 1926-27 and what they said to the Income-tax Officer was that, in respect of the accounting year 1980-81 when assessment was made in respect thereof under section 23 (4) as also under section 34, the entirety of their income which had accrued during the accounting year 1980-81 Dewali had been taken into consideration and, therefore, it must be taken that the Income-tax Officer had taken the amount of interest alleged to have accrued during the accounting year 1980-81 into his consideration and made the assessment accordingly. They alleged that as a matter of fact a sum of Rs. 2,51,955-11-0 was interest which was irrecoverable and, in the circumstances stated, they were entitled to claim a refund or set off in respect of this sum of Rs. 2,51,955-11-0. To this the Income-tax Officer replied that it appeared that, although the assessees had produced the books for 1981-82 and the books for 1979-80, they were careful in not producing the books for 1980-81 which was the relevant year for discussion on this question and he came to the conclusion that, inasmuch as no materials had been supplied to him for arriving at a conclusion favourable to the assessees on the question as to whether or not this sum of Rs. 2,51,955-11-0 had been recovered on account of interest, the assessees were unable to claim a set off or refund as against the assessment for the year 1926-27.

The Income-tax Officer on page 5 para 7 of the paper book points out certain very cogent reasons in support of this conclusion that a claim such as was propounded by the assessees before him was not entertainable on the facts. We have examined those reasons for ourselves and we are of opinion that nothing has been shown by the assessees on the present record for coming to the conclusion that those reasons are such as should be rejected and that the order made by the Commissioner of Income-tax should on the present Reference be revised. Further it is not stated anywhere in this paper-book covering as it does nearly 20 pages that, as a matter of fact this sum of money representing interest had not been recovered or got in by the assessees at any time leaving aside all questions of the accounting year 1980-81 or 1981-82. In this state of the record, the Commissioner of Income-tax came to the conclusion that the assessees being people who were urging a claim of set off had failed to satisfy him that a case for set off really existed and that, on the facts, a set off should be allowed. He thereupon rejected the assessees' claim.

The assessees have now come before us and they have urged through their learned Counsel that they cannot be assessed to tax on the said amount

of interest unless actually realized. Precisely so; but, in the circumstances of the present case, who is to show that it being the common ground that no interest had been assessed to tax so far as the accounting year 1981-82 is concerned? Further, the assessees have argued that, inasmuch as an assessment had already been made in respect of the previous accounting year under section 34, it must be taken that all income which had accrued and had escaped assessment had been assessed to tax and that, therefore, it must be held as a matter of law that this sum of Rs. 2,51,955-11-0 had already been assessed to tax. It is not desirable to pronounce opinions on academic questions of law. Assuming that it is a question of law, the answer to this depends upon an investigation of the facts and, on the facts the assessees are clearly out of Court, they having failed to produce any materials before the Income-tax Officer in support of their contentions.

In this view of the matter, the assessees have failed to substantiate the two points on which they desired the Income-tax Commissioner to state a case to this Court and they must pay the costs of this Reference.

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[469] IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Before Sir William Beaumont Kt., Chief Justice and Mr. Justice Rangnekar.

[18th August 1931]

The Tustees of Sir Currimbhoy Ebrahim Baronetcy Trust .. *Assessees.*

v.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 3, 40 and 55—Corporation constituted trustee under special Act—Vesting of properties and distribution of income in specified proportions—Beneficiary getting ¾th of income—Vested properties, Beneficiary alone, if assessable.

Under special Act of the Indian Legislature creating a special trust for the maintenance of the dignity of a Baronetcy, a corporation was constituted with perpetual succession and a common seal to act as trustees and certain properties were vested in them with power of sale and investment of the proceeds. Out of the income of the properties, the corporation after paying all rates and taxes and defraying the ordinary repairs and insurance charges and certain jointure provision for widows, had to set apart a certain proportion as a sinking and repair fund and to pay the residue, roughly amounting to 75% of the income to the beneficiary who was to have the actual management of the properties including the collection of rent. The corporation claimed that they as trustees were not assessable, as the special provisions for assessing trustees did not apply, the beneficiary not being a minor, or a non-resident of British India. On a reference to the High Court,

HELD that the Corporation was assessable as an individual to income-tax and super-tax on the income of the properties vested in them.

Case [Civil Reference No. 5 of 1929] stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay for the opinion of the High Court

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, and at the instance of the Corporation styled "The Trustees of the Sir Currimbhoy Ebrahim Baronetcy" (hereinafter referred to as the Corporation), I have the honour to refer for your Lordships' decision the question of the interpretation of sections 40, 55 and 56 of the Act, categorically set out in paragraph 11 below, which has arisen out of the super-tax assessment of the above Corporation for the financial year 1928-29. This question as well as the facts of the case enumerated in paras 2 to 10 below have been drafted in consultation with Messrs. Payne and Company, Solicitors for the Corporation as well as the law advisers of the Crown as required by your Lordships in the Registrar's letter No. 479 of 4th February 1927.

2. **Facts of the case:**—In the year 1911, Sir Currimbhoy Ebrahim of Bombay was created a Baronet. In 1913, an Act being Act No. IV of 1913 was passed by the Governor-General of India in Council entitled an Act for "settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, so as to accompany and support the title and dignity of a Baronet . . . and for other purposes connected therewith." This Act was to be called "The Sir Currimbhoy Ebrahim Baronetcy Act 1913." By section 2 of the Act "a Corporation with perpetual succession and a common seal under the style and title of 'The Trustees of the Sir Currimbhoy Ebrahim Baronetcy'" was created and four persons, viz., the Accountant-General of Bombay, the Collector of Bombay, the Chief Presidency Magistrate of Bombay, and the Baronet for the time being were "constituted as such Corporation the Trustees for executing the trusts, powers and purposes of the Act." Certain immoveable properties stated in the Act as assessed to be of the estimated value of 20 lakhs of rupees and described in the First and Second Schedules to the Act were by virtue of the Act vested in the Corporation under section 5. This section runs as follows:—

"5. Immediately upon the passing of this Act by force and virtue thereof the hereditaments and premises particularly described in the First Schedule hereunder written shall be vested in the said Corporation upon the trusts and for the purposes and with and subject to the powers provisions and declarations hereinafter declared and expressed and the hereditaments and premises particularly described in the Second Schedule hereunder written shall be vested in the said Corporation for all the respective residues of the respective terms granted by the said leases respectively to come and unexpired at the date of the passing of this Act upon the trusts and for the purposes and with and subject to the powers provisions and declarations hereinafter declared and expressed that is to say upon trust to permit the said Sir Currimbhoy Ebrahim for and during the term of his natural life and from and immediately after his disease to permit during the respective terms of their natural lives the successive male heirs of the body of the said Sir Currimbhoy Ebrahim who shall succeed to the title of Baronet conferred by the said Letters Patent (if he or they shall so desire) to use and occupy free of rent as their residence the hereditaments and premises particularly described in the Second part of the First Schedule hereunder written and also to use and occupy as his residence free of rent any one of the said hereditaments and premises particularly described in the First part

of the First and in the Second Schedules hereunder written and to demise all or any of the remaining hereditaments and premises for any term of years not exceeding seven years to take effect in possession within three months from the date of the lease."

3. Section 6 provides that out of the income the Corporation shall "pay all rates, taxes, assessments, dues and duties in respect of the said hereditaments and premises . . . and defray the cost of all ordinary repairs . . . and of insuring the same against fire and all other outgoings of every nature whatsoever."

4. Section 7 provides that after making the above payments from the income of the premises, "The Corporation shall out of the income remaining . . . form two funds" called the "Sinking Fund" and the "Repairs Fund" crediting to the former 00.61 per cent of 20 lakhs each six months and to the latter 3.72 per cent of two lakhs during each such period. Under section 8, the residue of the income after making all the above payments is to be paid to the Baronet for the time being provided he is of full age and using the name of Sir Currimbhoy Ebrahim. In case the Baronet is a minor, section 20 directs that the Corporation "shall pay and apply for and towards the maintenance education and benefit of such Baronet during his minority so much only of the income of the said properties as the Corporation shall in their discretion think proper and shall invest the residue to be paid over assigned and transferred to him when he attains majority.

5. The above is a brief resume of the principal provisions of the said Act to which a reference is considered necessary in connection with the assessment now in dispute. I may add here that the second Baronet who succeeded to the Baronetcy when of full age died in March 1928 and the third and present Baronet was also of full age when he succeeded.

6. For the purposes of assessment for the year 1928-29, a return of income for the previous year ended on 31-3-1928 was submitted on 26th September 1928. This was headed with the name of the assessee as "The Trustees of Sir Currimbhoy Ebrahim Bart. Trust" and was signed "Currimbhoy Ebrahim". As per this return of income, the Income-tax Officer levied income-tax on 11th October 1928. A copy of the assessment order and the assessment form dated 20th October 1928 giving details of the assessment accompanies this letter as exhibit B collectively. The amount of income-tax thus levied, viz., Rs. 6,485-13-0 was paid by the Corporation on 22nd February 1929 without any appeal to the Assistant Commissioner or protest. This is explained as due to the fact that the Corporation was under the impression that it would be made to pay income-tax alone and not super-tax as was done in the preceding year.

7. Thereafter on 11th March 1929, the Income-tax Officer by his order of that date assessed the Corporation to super-tax at Rs. 13,036-14-0 on the total income ascertained for income-tax purposes, viz., Rs. 1,91,795 less Rs. 50,000 in accordance with section 56 of the Income-tax Act and a notice of demand dated the 23rd March 1929 was given to the Corporation under section 29 of the Act.

8. This super-tax assessment was disputed on the ground that under an arrangement made in the preceding year 1927-28, income-tax alone was payable by the Corporation and not super-tax and a letter dated 24th April 1929 was written by Messrs. Payne and Company and an appeal was lodged

before the Assistant Commissioner on 26-4-1929. The Assistant Commissioner decided this appeal on 3-5-1929 confirming the assessment stating that it appeared from the records that the alleged arrangement was in force for the year 1927-28 alone, that the Corporation prior to that had paid both income-tax and super-tax and that the Baronetcy Trust was a Corporation and as such liable to income-tax and super-tax. A copy of the Assistant Commissioner's decision is Exhibit E. Against this decision, Messrs. Payne and Co., the Solicitors for the Corporation applied to me for a reference to your Lordships. As the petition was not signed by the Corporation, the Solicitors were asked to put in a duly signed petition which they did with their letter of 28th June last.

9. In the petition the argument advanced against the assessment in dispute is as under:—"The Trustees submit that they are not liable to be assessed either in income-tax or in super-tax. They did not raise any objection to income-tax as super-tax was not demanded from them. The Beneficiary under the Trust viz., the present Baronet held the title throughout the year 1928-29 and is in British India and is of age and the Trustees submit under the circumstances assessment cannot be levied on them."

10. As the previous history of the case has been referred to in the appeal petition as well as in the petition for a reference, I beg to add a few remarks but without prejudice to my submission that the question involved in the assessment under dispute should be decided entirely on its merits irrespective of whatever may have been done in the past. As stated in the petition for a reference (Exhibit F), up to the year 1927-28, the Corporation paid both income-tax and super-tax on its total income and the Baronet who received a part of it paid super-tax over again thereon as part of his own income. In the year 1927-28, objection was taken to this procedure and the Income-tax Officer thereupon levied income-tax alone on the Corporation and included its *total income* in the income from other sources of the Baronet concerned and levied super-tax on the whole amount thus arrived at. The income thus paid super-tax at a higher rate than what it would have done had it been taxed in the hands of the Corporation direct. This assessment by the Income-tax Officer was, however, not accepted by the Baronet concerned and an appeal in Messrs. Payne and Company's letter dated 3rd January 1928 was lodged against it. The Assistant Commissioner thereupon ordered that only the amount actually paid by the Corporation to the Baronet should be included in his income for super-tax purposes.

11. **Question for the decision of the High Court:**—The question which is to be decided by your Lordships is not categorically stated in the petition for a reference but I put it as under to which the Solicitors agree:—

"Was the Corporation correctly assessed to super-tax for the year 1928-29 by the Income-tax Officer as per his Order dated 11th March 1929 in view of the circumstances of the case and the provisions of sections 40 and 55 of the Income-tax Act, 1922?"

12. **Opinion of the Commissioner:**—As section 66 (2) of the Income-tax Act requires me to give my opinion while forwarding the Reference to your Lordships, I beg to state that under section 55 of the Act, the Corporation is liable to be assessed to super-tax as an "association of individuals". Hence it has been correctly assessed by the Income-tax Officer. Section 40 of the Act does not apply to this case.

13. As regards the assessments for the year 1927-28 referred to in para 10 above, I desire further to submit that both the then Income-tax Officer and the Assistant Commissioner overlooked the provisions of section 56 of the Income-tax Act which provide that where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment *shall* also be final and conclusive for the purposes of super-tax for the same year. It was incumbent on them therefore to levy super-tax on the Corporation on the total income on which income-tax was levied.

14. A copy of your Lordships' decision may kindly be certified to me for further action as required by section 66 (5) of the Act.

SUPPLEMENTARY CASE.

With reference to your letter No. 456 of the 23rd January 1930, I have, pursuant to the interlocutory judgment delivered by the Hon'ble the Chief Justice dated 17th December 1929 the honour to forward herewith the accompanying additions and amendments to the above Reference dated 3rd September 1929 which I also beg to return herewith together with two fair copies thereof embodying these amendments.

2. The date "29th March" in the question for decision was a "clerical error" and has been duly amended under my initials to "11th March" which is the correct date of the Income-tax Officer's order as stated in para 7 of the Reference. The clerical error is regretted.

3. With reference to the first sentence of para 9 of the judgment, I have assumed that the words "income-tax" is a mistake for the word "income" and have given the necessary information as regards "income" not "income-tax" in the addition now made to para 7 of the Reference in which is also incorporated all other information required by the Court.

Proposed amendments to paragraphs 7 and 13 of the Reference.

(1) Add at the end of para 7.

"The above income of Rs. 1,91,795 arose as under:—

Rs. 69,181—from house properties vested in the Corporation and forming part of the Baronetcy Trust Fund.

Rs. 1,02,390—Interest from tax-free securities forming part of the Baronetcy Trust Fund.

Rs. 20,223—Interest from taxed securities including:

(*a*) Rs. 10,500-0-11—from securities representing the Sinking Fund Investments.

(*b*) Rs. 6,395-3-7—from securities representing the Repair Fund Investments.

and

(*c*) Rs. 3,327-11-6—from the Trust Fund securities.

I find as a fact that in accordance with section 7 of the Baronetcy Act, a sum of Rs. 12,000 equivalent to 0.61 per cent. of Rs. 20 lakhs was carried by the Corporation to the Sinking Fund, and a sum of Rs. 7,440 equivalent to 3.72 per cent. of Rs. 2 lakhs was carried to the Repair Fund. Rs. 1,42,464-9-3 were paid to the Baronet. The amounts set apart for (1) the Sinking Fund and (2) the Repair Fund thus represent 6.36 per cent. and 3.87 per cent. respectively of the above total income and the amount paid to the Baronet represents 74.27 per cent. of the total income. The three amounts thus account for 84.5 per cent. of the statutory income on which tax has been levied. The remaining 15.5 per cent. of the statutory income must therefore represent items of expenditure inadmissible in the calculations of the statutory income such as payments on account of income-tax and super-tax, repair charges in excess of 1|6 of the annual rental value, etc., etc., as the case may be.

The Trust Funds at the end of the accounting period pertaining to this assessment consisted of two house properties valued at Rs. 10,60,990 and Government securities of the nominal value of Rs. 18,31,000. The Sinking Fund investments consisted of securities of the nominal value of Rs. 3,46,500 and the Repair Fund investments of securities of the nominal value of Rs. 2,11,000."

(2) Add at the end of para 13.

"They did not do so, however, and as this must have misled the Corporation into thinking that the same course would be followed also this year, for the sake of justice, it was considered better to submit for the Court's decision the question of the liability of the Corporation to assessment to super-tax even though under the provisions of section 56, the assessment for income-tax having already become final and conclusive for income-tax purposes, became also final and conclusive for super-tax purposes. The real question for decision in the case is—'Whether notwithstanding the payment already made of income-tax the Corporation were properly assessed to income-tax and super-tax or either of them for the year 1928-29 by the Income-tax Officer as per his orders of the 11th October 1928 and 11th March 1929 in view of the circumstances of the case and the provisions of sections 40 and 55 of the Income-tax Act, 1922'."

The matter is to be treated as if the payment of income-tax had not in fact been made, and the assessment of income-tax had not become final and conclusive provided the assessee undertakes not to claim any refund of income-tax actually paid."

The Advocate General with the Government Solicitor for the Crown.
Coltman with Messrs. Payne & Co., for the Assessees.

JUDGMENT.

BEAUMONT, C. J.:—This is a case which the Income-tax Commissioner has referred to this Court under section 66 (2) of the Indian Income-tax Act and the question which he asks as in his amended case is whether notwithstanding the payment already made of income-tax by the Corporation they were properly assessed to income-tax and super-tax or either of them for the year 1928-29 by the Income-tax Officer as per his orders of the 11th October 1928 and 11th March 1929 in view of the circumstances of the case and the provisions of sections 40 and 55 of the Income-tax Act, 1922.

The Corporation referred to are the trustees under a private Act No. IV of 1913 which was passed by the Governor-General of India in Council entitled an Act for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, so as to accompany and support the title and dignity of a Baronet and for other purposes connected therewith. Shortly before the passing of the Act Sir Currimbhoy Ebrahim had been created a Baronet and the purpose of the Act according to the preamble was to make provision for keeping up the Baronetcy. By section 2 of the Act there was constituted a Corporation with perpetual succession and a common seal under the style and title of the Trustees of the Sir Currimbhoy Ebrahim Baronetcy. That Corporation was to consist of the Accountant-General, Bombay, the Collector of Bombay, the Chief Presidency Magistrate of Bombay and the Baronet for the time being. Then by section 5 certain immoveable properties of the estimated value of 20 lakhs of Rupees described in the first and second Schedules to the Act were by virtue of the Act vested in the Corporation. Section 6 of the Act provided that out of the income of the properties the Corporation should pay all rates, taxes, assessments and dues and duties in respect of the said hereditaments and premises and defray the cost of all ordinary repairs and of insuring the same against fire and all other outgoings of every nature whatsoever. Then section 7 provided for the setting aside of a Sinking Fund and a Repair Fund by paying certain fixed proportions of the income into the Sinking Fund and Repair Fund. Then under section 8 the residue of the income after making all the above payments is to be paid to the Baronet for the time being provided he is of full age and using the name of Sir Currimbhoy Ebrahim. Then the Act contained provisions enabling the Corporation to sell the immoveable properties and invest the proceeds and there are powers for the Baronet for the time being of jointuring a widow and under section 29 the Baronet is to have the actual management of the hereditaments vested in the Corporation including the collection of rent.

The second Baronet died in March 1928, that is to say, just before the end of the financial year 1927-28. On 26th September 1928 the trustees under the Act made a return for income-tax for the year 1928-29, that is the year expiring on 31st March 1928 and on October 11, 1928 the Income-tax Officer made an order on the trustees to pay the income-tax. On 22nd February 1929 the trustees paid the tax. On 11th March 1929 the trustees were assessed to super-tax and they objected to the assessment and it was owing to their objection that this case was stated.

It appears from the case that for the previous year 1927-28 there had been an arrangement between the Income-tax Officer and the trustees under which the trustees paid the income-tax and the Baronet paid the super-tax and the trustees say that when they paid the income-tax for the year in dispute they assumed that the same arrangement would continue and that the Baronet would be charged with the super-tax. The Commissioner, not desiring to do anything unfair or to take advantage of a mistake, has agreed that he will not treat the payment of the income-tax as imposing any liability for the payment of super-tax under section 56 of the Income-tax Act, and that accordingly we should deal with the questions put to us without reference to that section and as though the income-tax for the year 1928-29 had not in fact been paid. On the other hand the assessee agrees not to claim any refund.

Now the argument which Mr. Coltman puts forward on behalf of the assessee—it is really on behalf of the Baronet—is that the general scheme of

the Act is to tax the person who actually enjoys the income, so that, he says, where you have property vested in A in trust to collect the income and pay the income over to B, it is B, the beneficiary, and not A, the trustee, who is to be assessed under the Act. The charging section under the Act is section 3 which provides that:—"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, firm and other associations of individuals." I think the Corporation constituted by the special Act is an individual within that section. The learned Commissioner seems to treat it as an association of individuals, but I think myself it comes within the term individual, and not an association of individuals, and on the words of that section it seems to me clear that the trustees can be charged, if you take that section alone.

When one comes to the later assessing sections 22 and 23, they seem to me to contain nothing to prevent the trustees being assessed. But Mr. Coltman relies very strongly on sections 40, 41 and 42 which contain special provisions for assessing trustees in certain specified cases as, for instance, where the beneficiary is a minor, lunatic or idiot or residing out of British India, and he says that if the Act enabled a trustee to be assessed in any case, it would be quite unnecessary to provide for those special cases of assessing the trustees. Well, I agree that there is a good deal of force in that argument. We were referred to the case of *Williams* v. *Singer and others, Pool* v. *Royal Exchange Assurance*[1] in which the question whether trustees or beneficiaries should be assessed to income-tax was fully discussed. The learned Law Lords were, of course, dealing with the English Acts which are worded quite differently from the Indian Act, but I think the conclusion at which Lord Cave arrived is applicable to cases under the Indian Act as to cases under the English Act. He points out that in a normal case, if you were to assess the trustee and not the beneficiary you would get into all sorts of difficulties, because the trustee might be entitled to allowance and so forth which the beneficiary would not be entitled to, and it would not do to confuse the beneficiary's income with the trustee's income, and therefore he says generally speaking the beneficiary is the person who should be charged. But then he points out that in certain cases the trustee might be the person to be charged as, for instance, when he holds property in trust for somebody who cannot deal with it, say an infant or lunatic, or in cases of trusts for accumulation of income, and then he sums up the matter thus:—"The fact is that if the Income-tax Acts are examined, it will be found that the person charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them he is liable to be assessed upon them. If the trustee rceives and controls them, he is primarily so liable."

Now that may be the general rule in the case of an ordinary trustee and beneficiary, indeed I think it is the general rule; but in the present case it seems to me we are dealing with something which is quite unusual. We

(1) 7 Tax Cas. 387.

have by a special Act of the Legislature a trust constituted which unless so constituted would not be recognised by the general law because it would infringe the rule against perpetuities. We have a Corporation specially created by the Act for the purpose of acting as a trustee under the Act. That Corporation has vested in it by the Act certain property. It has to a great extent to manage that property although the Baronet himself is given the power actually to collect the rents and so forth. But the trustees must receive the rents and income as they have to apply a proportion in effecting ordinary repairs and paying for insurance of the property, and they have also to set apart a proportion of the income to constitute the Sinking Fund and Repair Fund. There may also be a proportion of the income payable to a widow or widows for jointures and then the balance is payable to the Baronet. It seems to me that in such a case the trustees are a taxable unit in respect of this trust property. It appears from the case that of the total taxable income of the trustees the Baronet receives about 75 per cent and about 25 per cent is expended by the trustees either in the management or in establishing the two funds under the Act and plainly in respect of that 25 per cent the trustees are the only persons who can be assessed and charged because the income never goes into anybodyelse's hands. It seems to me that the Commissioner is entitled under section 3 of the Act to assess and charge the trustees, and there is nothing in any other part of the Act, so far as I can see, which prevents him from doing so. There is no express provision that trustees are not to be charged and it is obviously a convenient course in this case to charge the trustee. The difficulties which arise in the case of an ordinary trustee who has got other income vested in him—either trust income or private of his own—on which he may be assessed cannot arise here because these trustees are constituted simply for the purposes of this Act and they have got the income of this particular property vested in them and nothing else and there is no inconvenience in assessing them. I think therefore that in this special case and having regard to the peculiar circumstances and the peculiar language of the special Act the Commissioner is entitled to assess and charge the trustees both to income-tax and super-tax.

I should have said that the charging section in respect of super-tax is section 55, but that is worded in virtually the same way as section 3 and most of the argument in this case has proceeded on the basis that the Corporation are not liable for the income-tax. If they are liable for income-tax, I think they are also liable for super-tax. In my judgment therefore we must answer the question by saying that the Corporation were properly assessed to income-tax and super-tax for the year 1928-29 by the Income-tax Officer as per his orders of 11th October 1928 and 11th March 1929.

Assessee to pay the costs on the Original Side scale.- Costs include costs reserved.

RANGNEKAR J.:—I agree

[470] IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Before Sir William Beaumont Kt., Chief Justice and Mr. Justice Rangnekar.

[18th August, 1931]

Sundrabai Saheb .. *Assessee.*

v.

The Commissioner of Income-tax, Bombay .. *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 3 and 4 (3) (viii)—Maintenance decreed to Hindu widow—Rent free bungalow for residence—Assessability to income-tax.

The monthly maintenance allowance and the annual value of a rent free bungalow given to a Hindu widow under a decree of court not specifying whether the allowance was payable out of the corpus or income of her husband's estate consisting inter alia *of agricultural lands, are assessable to tax.*

Case [Civil Reference No. 15 of 1930) stated under Sec. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, (hereinafter referred to as "the Act") and at the instance of Shrimant Bai Sundrabai Saheb, widow of the late Lingappa Jayappa Sar-Desai of Sirsangi (hereinafter, referred to a "the assessee"), I have the honour to refer for your Lordships' decision the question of law set out in para 7 below which has arisen out of the income-tax assessment of the assessee for the financial year 1929-1930.

2. **Facts of the Case.** The assessee is the widow of the late Lingappa Jayappa Sar-Desai of Sirsangi, an Inamdar of Belgaum District. He died in 1906 leaving a will under which, in the words of the High Court, he practically left the whole property in charity, the value being estimated at nearly 7 lacs and allowed the widow (the assessee) only Rs. 100 a month for maintenance with directions that she should be provided with certain carriage equipage and servants etc. A copy of this will is annexed hereto marked as Exhibit A. The Collector of Belgaum was the executor under the will and the whole estate was to be managed by him and he was to be the President of the Committee appointed under it to administer the charities for the benefit of which the deceased left his estate as stated above. The said estate consisted of extensive landed properties held as inam etc., certain customary perquisites, securities, etc.

3. The assessee was not satisfied with what she was allowed under the will and sought the aid of the Civil Court, Belgaum. The matter ultimately came in appeal to the High Court, Bombay, and under its judgment dated 22-2-1921, that Court decreed that she should "get maintenance from 1st April 1921 at Rs. 900 a month" and "be allowed to continue to reside in her present Bungalow." A copy of the said judgment of the High Court is annexed hereto marked as Exhibit B.

4. For the purposes of the assessment to income-tax for the past financial year 1929-30 (ended 31-3-1930), when the Income-tax Officer proposed to tax her on the above maintenance, the assessee objected to pay any tax thereon and put in a written statement in Kanarese, the purport of which is as under as stated by the Income-tax Officer in his assessment order:—"I receive from the income of my Desgat Rs. 900 p.m. As I am the owner of the Desgat according to Hindu religion the income arises from that right. This money is partly derived from lands belonging to the Desgat. From no other source do I receive income. Income-tax cannot be levied on this income." (By "Desgat" she means the estate of the last Sar-Desai). The Income-tax Officer, however, held that the assessee was neither the owner of the estate nor even a co-parcener therein as the estate belonged wholly to the Charity Fund created under her husband's will, that the maintenance was not ordered to be paid to her from the agricultural income of the estate or from income from any other definite part of it, and that it was merely an allowance or annuity payable to her under the said will and that the whole of the annuity including the value of the rent-free bungalow was clearly income which was taxable under section 6 (vi) of the Act. He accordingly assessed her income at Rs. 11,640 and taxed it at Rs. 545-10-0 as per his assessment order dated 27-2-1930 a copy of which is annexed hereto and marked Exhibit C.

5. Not satisfied with this order, the assessee appealed to the Assistant Commissioner by her petition dated 11th March 1930 a copy of which with the grounds of appeal is hereunto annexed and marked Exhibit D. The assessee's argument in brief was that what she got was "in reality a portion of her husband's Desgat income" that "whether will or no will the widow" had "an inherent right under the Hindu Law to be maintained out of the estate of her husband" and that the legislature did not intend that the right of Hindu widows to receive maintenance should be treated under the Act as a taxable income. The Assistant Commissioner after hearing the appeal confirmed the assessment by his order dated 31-3-1930 holding that what the assessee got under the order of the High Court was not a right to a part of the estate nor was she a joint owner thereof, nor was it ordered that what was to be paid to her was to come out of the agricultural portion of the income of the estate or any other portion and that the amount being a fixed sum payable to her every year for life was an annuity liable to tax and fell under income from other sources (Sections 6 (vi) and 12 of the Act).

6. The assessee being dissatisfied with the Assistant Commissioner's decision, has now requested me to refer the matter to your Lordships for decision by her petition dated 26th April 1930. Therein the argument advanced is that the assessee's "right to the maintenance is not derived from the will of her husband", that the "income enjoyed by a Hindu widow for her maintenance is not liable to income-tax under any circumstances", that the "person who receives it (the income) in the first instance" is the "person who is liable" and that "the widow who got a part of it subsequently cannot be taxed for the same income again." It is further contended that the income of the Desgat is mainly if not wholly agricultural income and as such is not liable to income-tax. I accordingly submit for your Lordships' decision the question categorically set out in the next para which arises in the case.

7. **Question to be decided by the High Court.** In my respectful opinion, the question of law which arises in the case is as under:—"Whether in the circumstances of the case, the monthly maintenance of Rs. 900 payable for maintenance to the assessee by the Collector of Belgaum and the annual rental value of the rent free bungalow viz., Rs. 840, are liable to income-tax under the Act."

8. **Opinion of the Commissioner.** As section 66 (2) of the Act requires me to give my opinion while forwarding this reference to your Lordships, I beg to add that in my opinion the maintenance and the annual rental value of the bungalow are liable to tax *Vellanki Lakshmi Narasayamma Rao* v. *The Commissioner of Income-tax, Madras.*[1] The Collector of Belgaum is bound to pay the maintenance under the orders of the High Court whether the estate brings him any income or not. What he pays is not a certain share in the income which he gets from the estate varying with the income of the estate but a fixed maintenance payable independently of the income of the estate whatever it may be.

9. A copy of your Lordships' decision may kindly be certified to me as required by section 66 (5) of the Act for further action.

Nilkant Atmaram, for the Assessee.

The Advocate-General with the Government Solicitor, for the Crown.

JUDGMENT.

BEAUMONT, C.J.:—In this case the Commissioner of Income-tax raises the question "whether in the circumstances of the case the monthly maintenance of Rs. 900 payable for maintenance to the assessee by the Collector of Belgaum and the annual rental value of the rent free bungalow viz., Rs. 840 are liable to income-tax under the Act."

It appears that the assessee is a widow of Lingappa Jayappa Sardesai who died in the year 1906 leaving a will under which the assessee was given Rs. 100 a month for maintenance with certain provisions as to her right to have a carriage and servants and the rest of the estate was in effect given to charity. The widow subsequently applied to the Court for a greater allowance by way of maintenance and in the year 1921 the High Court on appeal ordered that she should get maintenance at Rs. 900 a month and be allowed to reside in her present bungalow. The question is whether those rights which she derived under the order of the High Court are subject to income-tax.

The contention of the assessee is that inasmuch as she alleges—she has not, I think, proved—that the estate of her husband consisted of land of an agricultural character the income of the estate is not liable to income-tax having regard to section 4 (3) (viii) of the Indian Income-tax Act and she says that her allowance by way of maintenance is to be treated as really giving her a part of the estate of her husband and therefore something which is free of income-tax. The answer seems to me to be that that is not the order of the Court. She is not given a part of the estate or a part of the income but she is given out of the estate a monthly sum of Rs. 900. It may be payable out of the income or it may be payable out of the corpus and the mere fact that if it is payable out of the income, that income itself may not be subject to tax seems to me to be wholly irrelevant. I think therefore we should answer the question by saying that the monthly maintenance of Rs. 900 and the rent of the bungalow are liable to income-tax.

Costs payable by the assessee on the Original Side scale.

RANGNEKAR, J.:—I agree.

(1) 3 I.T.C., 428.

GENERAL INDEX

Basis of Assessment

Deductions

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